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NO. 41677-8-II

STATE OF WASHINGTON

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE: WASHINGTON BUILDERS BENEFIT TRUST,

RE SOURCES FOR SUSTAINABLE COMMUNITIES, A-1
BUILDERS, SF MCKINNON COMPANY INC., CABINETWORKS,
LIVING SPACE,

Appellants,

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, et al.,

Respondents/Cross-Appellants.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS
BIAW, BIAW-MSC, WBBT AND INDIVIDUAL WBBT TRUSTEES

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL	1
III. ISSUES RELATED TO ASSIGNMENTS OF ERROR	2
IV. STATEMENT OF THE CASE	4
A. The Parties	5
B. The Retrospective Rating (“Retro”) Program.....	7
C. WBBT, the Declaration of Trust, and Enrollment Agreements	9
D. Interest and Investment Earnings.....	12
V. ARGUMENT	15
A. The Trial Court Correctly Entered Summary Judgment Dismissing Plaintiffs’ Marketing Assistance Fee Claims Because the Fee is Expressly Authorized.	15
1. The Enrollment Agreements and the Declaration of Trust Authorize Payment of the Marketing Assistance Fees.	16
2. Plaintiffs’ Argument that the Marketing Assistance Fees Are a Breach of Trust Because they Exceed State Defendants’ Actual Expenditures on Marketing is Immaterial and Wrong.	21
3. Payment of the 10% Fee is Not “Self-Dealing.” ...	22
4. The Timing of the Fee Payments is Consistent with the Terms of the Declaration of Trust and the Enrollment Agreements.	24

5.	State Defendants Have Never Hidden the Fact that they Earned Revenue from the Marketing Assistance Fee.....	26
B.	The Trial Court Erred in Determining that the Enrollment Agreement Is a Governing Trust Instrument.	27
C.	The Trial Court Erred in Determining that MSC's Retention of Interest Was a Breach of Trust.....	30
1.	MSC May Earn and Retain Inbound Interest.....	31
2.	MSC May Earn and Retain Outbound Interest.	31
a.	There is no claim for de minimis amounts.	32
b.	The interest MSC retains is reasonable compensation to MSC for the services it performs.	34
c.	Retention of interest earned while processing distributions is a usual and customary practice.	35
d.	Participants failed to mitigate to the extent MSC earned interest after they could have deposited their checks.....	36
D.	The Trial Court Appropriately Exercised its Discretion to Not Order Monetary Relief.....	37
1.	State Defendants Acted with Good Faith and Honest Judgment.....	38
2.	For the Same Reasons Retaining Minimal Interest is not a Breach, No Award of Money is Justified.	39
3.	Plaintiffs' Only Monetary Claim is for Damages, Which Plaintiffs Waived.....	40

E.	Plaintiffs Have Waived the Remaining Assignments of Error.	41
F.	The Trial Court Erred by Declining to Give Full Effect to Exculpatory Provisions in the Enrollment Agreements and Declaration of Trust.	42
G.	The Trial Court Erred by Determining that All State Defendants Breached the Trust by the Actions of Only Some State Defendants.	43
H.	The Trial Court Appropriately Denied Plaintiffs an Award of Attorneys' Fees and Costs but Erred in Failing to Award State Defendants their Attorneys' Fees and Costs.....	44
I.	The Court Should Award State Defendants Fees on Appeal.	50
VI.	CONCLUSION.....	50

TABLE OF APPENDICES

Appendix 1	March 4, 2011 Judgment (including Findings of Fact and Conclusions of Law) (CP 8115-8156)
Appendix 2	March 4, 2011 Findings of Fact, Conclusions of Law and Order Denying All Motions for Awards of Attorney Fees and Costs (CP 8109-8114)
Appendix 3	September 13, 2010 Order on Cross-Motions for Summary Judgment (including August 6, 2010 Letter Opinion) (CP 4996-5015)
Appendix 4	1994 Declaration of Trust (Trial Exhibit 2027, CP 8904-8914) (emphasis added)
Appendix 5	2007-08 ROII Enrollment Agreement (Trial Exhibit 2227, CP 8893-8902) (emphasis added)
Appendix 6	Explanation of Flow of Funds (Exhibit 1 to September 15, 2009 Declaration of Sou Chiam) (CP 1599-1610)
Appendix 7	Appendices A & B to the April 23, 2010 State Defendants' Motion for Judgment on Petitioners' Trust Claims Based on the ROII Enrollment Agreement (CP 1504-1513)
Appendix 8	Interest Chart (excerpt from Trial Exhibit 1485)
Appendix 9	RCW 11.96A.150 (emphasis added)
Appendix 10	WAC 296-17B-200 (emphasis added)
Appendix 11	WAC 296-17-90455 (emphasis in bold italics added)

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Allard v. Pac. Nat'l Bank</i> , 99 Wn.2d 394, 663 P.2d 104 (1983).....	46, 47
<i>Baldus v. Bank of Cal.</i> , 12 Wn. App. 621, 530 P.2d 1350 (1975).....	16, 21
<i>Banks v. Banks</i> , 648 So. 2d 1116 (Miss. 1994).....	36
<i>Bartlett v. Betlach</i> , 136 Wn. App. 8, 146 P.3d 1235 (2006).....	46
<i>Borish v. Russell</i> , 155 Wn. App. 892, 230 P.3d 646 (2010).....	49
<i>Breaks v. Spokane Auto Co.</i> , 93 Wash. 143, 160 P. 291 (1916).....	32, 33
<i>Brinson v. City of New York</i> , 795 N.Y.S.2d 553 (App. Div. 2005).....	36
<i>Burndridge v. Fluor Fed. Servs. Inc.</i> , 164 Wn.2d 432, 191 P.3d 879 (2008).....	31, 43
<i>Carder Buick-Olds Co. v. Wooten</i> , 308 S.W.3d 156 (Ark. Ct. App. 2009).....	33, 36
<i>Cohan v. Alvord</i> , 162 Cal. App. 3d 176, 208 Cal. Rptr. 421 (1984).....	33
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d. 801, 828 P.2d 549 (1992).....	41
<i>Crest Inc. v. Costco Wholesale Corp.</i> , 128 Wn. App. 760, 115 P.3d 349 (2005).....	46, 47, 49
<i>Druskin v. Answerthink, Inc.</i> , 299 F. Supp. 2d 1307 (S.D. Fla. 2004).....	33

<i>Endicott v. Saul</i> , 142 Wn. App. 899, 176 P.3d 560 (2008)	46
<i>Erickson v. Erickson</i> , 30 Wn.2d 914, 194 P.2d 954 (1948)	32, 33
<i>Escude ex rel. Escude v. King Cnty. Pub. Hosp. Dist. No. 2</i> , 117 Wn. App. 183, 69 P.3d 895 (2003)	41
<i>Farmer v. Farmer</i> , 172 Wn.2d 616, 259 P.3d 256 (2011)	37
<i>Finkelstein v. Finkelstein</i> , 502 A.2d 350 (R.I. 1985)	33
<i>Flitcroft v. Comm’r</i> , 328 F.2d 449 (9th Cir. 1964)	30
<i>Hearst Commc’ns, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005)	20
<i>Hoffman v. Tieton View Cmty. Methodist Episcopal Church</i> , 33 Wn.2d 716, 207 P.2d 669 (1949)	30
<i>Hough v. Stockbridge</i> , 150 Wn.2d 234, 76 P.3d 216 (2003)	37
<i>Hubbard v. Spokane Cnty.</i> , 146 Wn.2d 699, 50 P.3d 602 (2002)	42
<i>In re Ambanc Le Mesa Ltd. P’ship</i> , 115 F.3d 650 (9th Cir. 1997)	33
<i>In re Estate of Burks</i> , 124 Wn. App. 327, 100 P.3d 328 (2004)	48
<i>In re Estate of D’Agosto</i> , 134 Wn. App. 390, 139 P.3d 1125 (2006)	48
<i>In re Estate of Ehlers</i> , 80 Wn. App. 751, 911 P.2d 1017 (1996)	48

<i>In re Estate of Frank,</i> 146 Wn. App. 309, 189 P.3d 834 (2008)	50
<i>In re Estate of Morris,</i> 89 Wn. App. 431, 949 P.2d 401 (1998)	47
<i>In re Estate of Vance,</i> 11 Wn. App. 375, 522 P.2d 1172 (1974)	16, 24
<i>In re Estate of Winslow,</i> 30 Wn. App. 575, 636 P.2d 503 (1981)	24
<i>In re Morgan Guar. Trust Co.,</i> 396 N.Y.S.2d 781 (Sur. Ct. 1977)	33
<i>Kelly v. Foster,</i> 62 Wn. App. 150, 813 P.2d 598 (1991)	41
<i>Laughlin v. March,</i> 19 Wn.2d 874, 145 P.2d 549 (1944)	29, 30
<i>Leppaluoto v. Eggleston,</i> 57 Wn.2d 393, 357 P.2d 725 (1960)	40
<i>Merriman v. Cokeley,</i> 168 Wn.2d 627, 230 P.3d 162 (2010)	23
<i>Mike's Painting, Inc. v. Carter Welsh, Inc.,</i> 95 Wn. App. 64, 975 P.2d 532 (1999)	50
<i>Morris v. Swedish Health Servs.,</i> 148 Wn. App. 771, 200 P.3d 261 (2009)	38
<i>Northwest Independent Forest Manufacturers' v. Department of Labor & Industries,</i> 78 Wn. App. 707, 899 P.2d 6 (1995)	29
<i>Rigg v. Lawyer,</i> 67 Wn.2d 546, 408 P.2d 252 (1965)	20
<i>Senn v. Nw. Underwriters, Inc.,</i> 74 Wn. App. 408, 875 P.2d 637 (1994)	36

<i>Sherwood B. Korssjoen, Inc. v. Heiman</i> , 52 Wn. App. 843, 765 P.2d 301 (1988)	40
<i>Sorrel v. Eagle Healthcare, Inc.</i> , 110 Wn. App. 290, 38 P.3d 1024 (2002)	32, 37
<i>St. Joseph Gen. Hosp. v. Dep't of Revenue</i> , 158 Wn. App. 450, 242 P.3d 897 (2010)	42
<i>State ex rel. Hays v. Wilson</i> , 17 Wn.2d 670, 137 P.2d 105 (1943)	37
<i>Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency</i> , 535 U.S. 302 (2002)	29
<i>Van de Kamp v. Bank of Am.</i> , 204 Cal. App. 3d 819, 251 Cal. Rptr. 530 (1988)	35
<i>Wachovia Bank of Ga., N.A. v. Namik</i> , 620 S.E.2d 470 (Ga. Ct. App. 2005)	36
<i>Wash. State Major League Baseball Stadium Pub. Facilities Dist.</i> <i>v. Huber, Hunt & Nichols-Kiewit Constr. Co.</i> , 165 Wn.2d 679, 202 P.3d 924 (2009)	16, 27, 30
<i>Williams v. Queen Fisheries, Inc.</i> , 2 Wn. App. 691, 469 P.2d 583 (1970)	40
<i>Work v. United States ex rel. Rives</i> , 295 F. 225 (D.C. Cir. 1924), <i>rev'd on other grounds</i> , 267 U.S. 175 (1925)	19
<i>Young v. Young</i> , 164 Wn.2d 477, 191 P.3d 1258 (2008)	40
STATUTES	
RCW 4.84.330	49
RCW 11.96A.150	46, 48, 50
RCW 11.96A.150(1)	46

RCW 11.97.010	43
RCW 11.100.010	24
RCW 11.104A.070(b).....	31
RCW 11.106.020	44
RCW 51.18.005 <i>et seq.</i>	7
RCW ch. 51.18.....	4, 28

RULES AND REGULATIONS

RAP 3.4.....	3
RAP 10.3.....	41
RAP 10.3(a)(6).....	42
RAP 18.1.....	50
WAC 219-17B	7
WAC 296-17-90401 <i>et seq.</i>	7
WAC 296-17-90410.....	28
WAC 296-17-90445.....	8, 28, 29, 33
WAC 296-17-90490 (2010).....	7, 11
WAC 296-17B	4
WAC 296-17B-010 <i>et seq.</i>	7
WAC 296-17B-010.....	4
WAC 296-17B-200.....	7, 8, 11, 28
WAC ch. 296-17	4

OTHER AUTHORITIES

66 AM. JUR. 2D <i>Restitution and Implied Contracts</i> § 37 (2001)	40
1 AUSTIN SCOTT ET AL., SCOTT & ASCHER ON TRUSTS § 2.2.4, at 42 (5th ed. 2006)	43
4 AUSTIN SCOTT <i>ET AL.</i> , SCOTT & ASCHER ON TRUSTS §24.9, at 1693 (5th ed. 2007)	37
BLACK'S LAW DICTIONARY 644 (6th ed. 1990)	19
RESTATEMENT (SECOND) OF TRUSTS §§ 179 cmt. d	37
RESTATEMENT (THIRD) OF TRUSTS § 4, cmt. a (2003)	20

I. INTRODUCTION

This is a case about a trade association's creation and operation of a retrospective rating ("retro") program designed to generate revenue for the association, increase worker safety, and provide participating association members with the opportunity to earn a partial refund of workers compensation premiums paid to the Department of Labor and Industries.

Five participating member companies (out of more than 6,000 participants) sued, claiming that the association violated their Constitutional rights by using the revenue from the retro program to fund political speech with which they disagreed. Over the course of more than three years of litigation in federal and state courts, most of Plaintiffs' claims were gradually dismissed and the lawsuit evolved into a trust case.

Plaintiffs' central claim is that the association's fee structure, though expressly set out in the enrollment agreements signed by all the participants, was too large and constituted a breach of trust. The trial court entered summary judgment dismissing Plaintiffs' central claim. Plaintiffs' remaining claims, involving minor technical issues, were also largely rejected by the trial court.

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

1. The trial court erred in entering its September 13, 2010 Order on Cross-Motions for Summary Judgment. (CP 4996-5015) (App. 3).

2. The trial court erred in entering its March 4, 2011 Judgment (CP 8115-8156) (App. 1), specifically the following findings of fact (“FF”): (a) FF 17 (CP 8123), (b) FF 24 (CP 8124), (c) FF 26 (CP 8125), (d) FF 33 (CP 8127), (e) FF 48 (CP 8129), and (f) FF 61 (CP 8131).

3. The trial court erred in entering its March 4, 2011 Findings of Fact, Conclusions of Law and Order Denying all Motions for Awards of Attorney Fees and Costs (CP 8109-8114) (App. 2), specifically finding of fact (“Fees FF”) 4 (CP 8110).

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred on summary judgment by ruling that the 6,000 enrollment agreements entered into by BIAW and participants imposed trust duties on BIAW, BIAW Member Services Corporation (“MSC”), and the Washington Builders Benefit Trust (“WBBT”) and its trustees (collectively “State Defendants”)¹ instead of determining that the trust is governed by the WBBT 1994 Declaration of Trust?

2. Whether the trial court erred by entering summary judgment against State Defendants for breach of trust based on allegations that MSC improperly commingled and retained interest (the “inbound interest”) earned on retro program refunds received from the Department of Labor and Industries (“DLI”), when the refunds belonged to BIAW as retro

¹ BIAW, MSC, WBBT and its trustees were collectively referred to as the “State Defendants” in the trial court to distinguish those entities from the 15 local homebuilding associations that were also defendants.

group sponsor, not retro program participants, were de minimis, and were not yet subject to a trust?

3. Whether the trial court erred by entering summary judgment and judgment following trial against State Defendants for breach of trust based on allegations that MSC retained de minimis amounts of interest on funds held during the distribution of retro refunds to participants (the “outbound interest”), even though the interest represented reasonable compensation, is customarily retained by professional trustees, and was accrued in part by participants’ failure to timely cash their checks?

4. Whether the trial court erred by entering judgment against State Defendants collectively for the alleged breaches of trust by only one of them, specifically: (1) entering judgment against BIAW and WBBT for MSC’s retention of interest and (2) entering judgment against BIAW and MSC for WBBT’s lack of an accounting?

5. Whether the trial court erred by refusing to give full effect to valid exculpatory clauses invoked by State Defendants who acted in good faith?

6. Whether the trial court, which denied all monetary recovery to Plaintiffs² and found for State Defendants on every major issue, erred by denying an award of attorneys’ fees and costs to State Defendants.

² Appellants ReSources for Sustainable Communities, S.F. McKinnon Co., Inc., A-1 Builders, Cabinetworks, and Living Space were referred to collectively as “Petitioners” in the trial court but, to avoid confusion with the designation of parties under RAP 3.4, are referred to collectively on appeal as “Plaintiffs.”

IV. STATEMENT OF THE CASE³

This case is primarily a dispute over revenue generated by the operation of a retrospective rating (“retro”) program sponsored by BIAW, under RCW 51.18 and WAC 296-17B. A retro program is a voluntary financial incentive program offered by DLI to encourage improvements in workplace safety. WAC 296-17B-010. Trade associations sponsor retro groups because they provide an opportunity for an industry association to earn refunds of workers compensation premiums their members are required to pay under chapter 296-17 WAC. If a retro group controls its losses by preventing workplace illnesses and injuries, and helping injured workers return to work, such that claims made by group participants are less than the premiums paid by group participants, the group sponsor will earn a refund from DLI of the difference. On the other hand, if claims made by group participants exceed the premiums paid, the group sponsor is liable to DLI for the difference. *E.g.*, WAC 296-17B-010. The sponsor, therefore, has a financial incentive to promote safety and provide claims assistance to its participating members. RP 9/15 49:13-50:16; RP 9/15 103:6-104:8.

³ The facts set forth in this section describe the parties and the retro program as it existed during trial court proceedings. As a result of changes by DLI to its refund calculations and an increase in injury claims during a weak economy, retro programs in Washington are no longer significant sources of revenue for trade associations. In 2011, rather than earning a refund, most retro sponsors were required to pay additional premiums to DLI. To address this new environment, BIAW has significantly changed its retro program. Nevertheless, for purposes of this appeal, Respondents use the facts as they existed during the trial court proceedings.

A. The Parties

BIAW is a not-for-profit state-wide trade association focused on promoting the interests of homebuilders and related businesses in Washington. BIAW is comprised of more than 13,000 mostly small businesses involved in the residential construction and remodeling business. CP 8883. BIAW is democratically run by its members, who voluntarily join the association. *E.g.*, RP 9/15 35:10-41:7. BIAW members are able to take advantage of numerous services offered by the association, including education, training, legal, safety, public relations, legislative and political programs. CP 8803. These services are expensive, however. It is only through revenue-generating programs, like the retro program at issue, that BIAW is able to offer all of its services and effectively serve its members' needs. *E.g.*, RP 9/15 41:16-43:1.

BIAW-Member Services Corporation ("MSC") is BIAW's wholly-owned for-profit subsidiary, which was created in late 1993 to manage BIAW's revenue-generating activities and to assist with the administration of some BIAW programs, including the retro program that is the subject of this lawsuit. MSC staff also provides administrative support to the Washington Builders Benefit Trust's volunteer trustees. *E.g.*, RP 9/15/ 45:25-46:22; RP 9/15 113:4-6, 115:6-116:7, 118:22-119:9, 120:16-121:5, 125:19-128:17, 131:7-133:7.

The Washington Builders Benefit Trust ("WBBT") is the trust related to BIAW's retro program. BIAW created WBBT to hold and

invest refunds received by BIAW from the DLI, until those funds are distributed to participants. *E.g.*, RP 9/14 117:8-24; RP 9/13 133:16-22; RP 9/15 56:15-57:6; RP 9/15 113:1-3. The beneficiaries of WBBT are BIAW and BIAW member companies that participate in BIAW's retro program. *E.g.*, App. 4 (Ex. 2027) at 3 § 1 A-B; RP 9/15 67:3-68-9; RP 9/14 117:8-118:12.

WBBT is managed by seven volunteer trustees appointed by BIAW's president, who selects the trustees from among BIAW's membership. *E.g.*, RP 9/15 56:21-60:2; RP 9/14 119:4-8. WBBT has no staff. It relies upon MSC to provide administrative support, calculate and process refunds, and handle the reconsideration process for companies rejected by the retro program based on WBBT's underwriting criteria. *E.g.*, RP 9/15 46:16-22, 57:7-58:1; RP 9/15 113:4-6, 115:6-116:7, 118:22-119:9, 120:16-121:5, 125:19-128:17, 131:7-133:7; Ex. 2169 at Response to Interrogatory 12.

Plaintiffs are five *former* participants in BIAW's retro program. Plaintiffs are or were also each members of BIAW and one of BIAW's local associations. *E.g.*, RP 9/15 94:20-25, 96:3-9. Eight other participants in BIAW's retro program joined the lawsuit and opposed the relief sought by Plaintiffs. CP 4847-4851. Dozens and dozens of other participants submitted declarations in opposition to Plaintiffs' class claims. CP 9077-9409.

B. The Retrospective Rating (“Retro”) Program

Since the 1980s BIAW has sponsored a retro program pursuant to and subject to RCW 51.18.005 *et seq.* and DLI regulations now found at WAC 296-17B.⁴ DLI does not regulate the fees that sponsoring organizations such as BIAW charge. Nor does DLI dictate the form or content of contracts between a sponsoring organization and its participants. WAC 296-17B-200; WAC 296-17-90490 (2010); RP 9/15 105:9-18.

BIAW refers to its retro program as the Return on Industrial Insurance program (“ROI”). The structure of BIAW’s ROI plan was largely unchanged from 1994 until after trial. *E.g.*, RP 9/15 53:5-54:9.

BIAW created the ROI program (1) to be attractive and affordable to BIAW’s membership (generally smaller companies connected in some way to the residential construction industry), (2) to give participants an opportunity to get a refund of some of the workers compensation insurance premiums paid to the state, (3) to generate revenue for BIAW and the local associations, and (4) to create incentives for participants and the association to improve workplace safety. *E.g.*, RP 9/15 49:13-50:14; RP 9/15 103:6-12, 106:5-107:1, 107:12-108:3.

To meet these goals, BIAW implemented a structure that (1) has

⁴ At the time of trial, the regulations governing retro programs existed at WAC 296-17-90401 *et seq.* (2010). Shortly after trial, the regulations were clarified and restated at WAC 296-17B-010 *et seq.* See Dep’t of Labor and Indus., WSR 10-21-086 (Permanent Rules) at 1 (Oct. 19, 2010) (adopting new regulations “to improve the overall order and clarity”).

low up-front enrollment fees, to encourage and enable participation by small businesses, (2) has education and claims handling services to reduce injuries and keep claims costs low, (3) gives BIAW and the local associations each 10% of any refunds received by BIAW from DLI, and (4) reimburses BIAW for costs incurred in administering the program. This fee structure creates incentives for BIAW to run a safe, effective program and for the local associations to work to increase enrollment. *E.g.*, RP 9/15 106:5-107:1, 107:14-108:3; RP 9/14 107:24-108:4.

Under the program, DLI pays all group refunds, if any, to the plan sponsor, BIAW. The “refund is the property of the group sponsor.” WAC 296-17B-200; *see also* 296-17-90445 (2010) (“All retro group refunds are paid directly to the sponsoring organization”). BIAW, as plan sponsor, is also directly responsible to DLI for any shortfalls. *Id.* DLI pays group refunds relating to a particular plan year over the course of three years as it processes claims for participants. RP 9/15 104:17-105:8.

BIAW, MSC, and the local associations expend significant time, effort, and funds to market and promote the ROII program. In addition to direct marketing, many of the activities of BIAW, MSC, and the local associations help promote and increase enrollment in the ROII program indirectly. *E.g.*, RP 9/15 122:10-124:3.

The ROII program has grown significantly since 1994 and, at the time of trial, was one of the largest and one of the most successful retro programs in the state with roughly 6,000 participating employers. RP 9/15

101:17-18, 110:3-8; RP 9/14 127:3-21. Even Plaintiffs agreed that BIAW's retro program is the best in the State. RP 9/22 115:16-19.

C. WBBT, the Declaration of Trust, and Enrollment Agreements

BIAW created WBBT to hold and invest the refunds paid by DLI to BIAW until distribution to the employer participants. *E.g.*, RP 9/15 56:15-57:6; RP 9/15 113:1-3; App. 4 (Ex. 2027) at 1. Because DLI makes its determination of the proper amount of refunds for a given year over the course of the following three years, and because DLI may request BIAW to return, in the second and third year, some or all of the amounts paid in the first year, plan sponsors do not generally pay participants everything received from DLI during the year of the first adjustment (because it would be difficult to try to claw back refunds paid in previous years from thousands of participants). *E.g.*, RP 9/15 104:17-105:8, 118:5-21.

In July of each year, after DLI pays BIAW the first of the three adjustments, WBBT distributes 70% of the first adjustment to participants. The following year, WBBT distributes an additional 20% of the total of the first and second adjustments (i.e., 90% of the amount then estimated to be due, minus the amount paid the prior year). Then in July of the following year, after the third and final adjustment is received from (or paid to) DLI, WBBT distributes the remaining amount, if any, to participants. *E.g.*, RP 9/15 117:12-118:2.

When BIAW created WBBT, it did so through the 1994 Declaration of Trust, which the trustees consider to be the governing trust

instrument.⁵ Ex. 2027; RP 9/15 56:15-22; RP 9/14 18:9-19; RP 9/14 192:20-193:3. The original trustees signed the 1994 Declaration of Trust to show their acceptance of the instrument and their obligations as trustees. App. 4 (Ex. 2027). Subsequent trustees have also agreed to be bound by the 1994 Declaration of Trust. CP 8281-82.

The structure of BIAW's retro program and the allocation of responsibilities among BIAW, MSC, and WBBT are due in part to tax and liability considerations for BIAW, WBBT, and the employer participants. RP 9/15 44:15-45:24, 53:3-14; RP 197:16-198:11. In particular, the responsibility for running the retro program, which could be considered a business activity that generates profit, is vested in MSC (as BIAW's designee under the enrollment agreement) rather than in the trust. *E.g.*, RP 9/15 44:23-45:3. This helps ensure that neither the trust nor the individual trustees is liable for the business operations of the retro program and minimizes the risk that refunds would be taxed twice (once when received by the trust and once when delivered to participants). RP 9/15 44:23-45:24, 53:5-14; RP 9/14 197:16-198:13.

To participate in BIAW's ROI program, each of the approximately 6000 employee participants must, each year, demonstrate its eligibility and sign an enrollment agreement. DLI does not regulate

⁵ The 1994 Declaration of Trust and enrollment agreements that are central to this dispute were part of the record on summary judgment and at trial. *See* CP 8903-14 & Ex. 2027 (1994 Declaration of Trust); CP 8893-8902 & Ex. 2227 (2007–2008 Enrollment Agreement). Copies of these documents are attached as Appendices 4 and 5, respectively.

these contracts between BIAW and members who choose to participate. WAC 296-17B-200; WAC 296-17-90490 (2010); RP 9/15 40:15-19, 74:1, 111:11-14; 129:23-131:3. The enrollment agreements describe WBBT as the trust that will hold and invest the refunds that DLI pays to BIAW. App. 5 (Ex. 2227).

Paragraph 4 of the enrollment agreements specifically authorizes three distinct payments: a small enrollment fee, the costs and expenses for operating and administering the plan, and a fee referred to by the parties as a Marketing Assistance Fee (“MAF”), described as follows:

The Member agrees to pay to BIAW or its subsidiary a Member Enrollment Fee equal to one and one-half percent (1.5%) of the Member’s Premium . . . or One Hundred Fifty and no/100 Dollars (\$150.00), whichever amount is greater. The Member Enrollment Fee is payable on submission of this Agreement to BIAW.

...

The Member further authorizes the Trustees to pay from the Premium Returns the balance of the Enrollment Fee and such costs and expenses for the operation and administration of the Plan as the Trustees may direct.

...

The Member further authorizes the Trustees to transfer ten percent (10%) of the Participants’ Premium Returns applicable to the Coverage Period to local associations and 10% to BIAW for marketing and promotion of the Plan

App. 5 (Ex.2227) at 4 ¶4(a)-(b).⁶

⁶ After this suit was filed, BIAW changed the enrollment agreements to provide:

In consideration for their efforts in marketing and promoting the Plan, the Member further authorizes the Trustees to pay ten percent (10%) of the Participants’ Premium Returns applicable to the Coverage Period to local associations and 10% to BIAW.

Similarly, Article IV, Section 11 of the 1994 Declaration of Trust provides:

[T]he Trustees shall to [sic] pay to BIAW a marketing assistance fee of 10% of all Employer Participants' distributive shares of the Fund. . . . [T]he Trustees shall pay to any local association . . . a marketing assistance fee of 10% of the distributive share of the Fund allocated to Employer Participants who are members of such local association.

App. 4 (Ex. 2027) at 6-7.

D. Interest and Investment Earnings

Each year, in late April or early May, if the group has earned a refund, DLI issues a warrant to BIAW, as sponsor of the ROII plan.⁷ When the DLI warrants arrive, they are deposited in an MSC money market account at South Sound Bank. RP 9/15 113:15-114:2; RP 9/16 140:4-14; Ex. 1485 (Report at 2-3). South Sound Bank's policies require that funds deposited in MSC's account remain there for at least two business days before being transferred out. MSC endeavors to transfer these primary adjustments received from DLI to WBBT's investment account at Wells Fargo (formerly A.G. Edwards) as soon as it is able. RP 9/15 62:22-63:3; RP 9/16 20:1-21:5, 140:4-141:2, 145:1-7; Ex. 1485 (Report at 3); CP 6762-88 42:10-15, 44:11-17, 47:21-48:7.

Ex. 1411 at BIAW-055077 ¶4(a)-(b). All Plaintiffs voluntarily applied to participate in BIAW's ROII program for the 2008-09 plan year and signed that year's enrollment agreement with the new language. CP 8565-66 at 121:1-122:6; DuPre 9/14/2010 at 144:23-25; Exs. 1411, 1409, 1408.

⁷ An overview of the flow of funds related to refunds received by BIAW is shown in Appendix 6.

Because the funds received from DLI are held in a money market account before being transferred to WBBT, MSC earns interest on those funds while it holds them. RP 9/15 79:11-15; RP 9/16 140:4-141:8; Ex. 1485 (Report at 2-5). MSC retains this inbound float interest.

During the years 2004-2008, nearly \$200 million was transferred from DLI to MSC to WBBT. RP 9/16 141:12-13; Ex. 1485 (Report at 5). MSC earned a total of \$63,000.38 of inbound interest on this amount, equal to about 3/10,000 (i.e., 3/100 of 1%) of the amount transferred or about \$2.08 per participant per year. RP 9/16 141:12-142:13; Ex. 1485 (Report at 5). The average annual inbound interest per participant earned by MSC during that time ranged from a low of 44¢ in 2004 to a high of \$5 in 2007. Ex. 1485 (Report at 5).

After receiving the funds from MSC, WBBT invests them through investment accounts at Wells Fargo. The trustees, in consultation with an investment advisor at Wells Fargo, make decisions on where to invest the funds. RP 9/14 124:19-125:6; RP 9/15 136:1-7; Ex. 1485. All realized investment earnings that are earned while the funds are held by WBBT are paid to the participants. RP 9/15 136:5-13; RP 9/16 178:25-181:13; Ex. 1485 (Report at 7-8).

In June of each year, the 10% fee that is to be paid to the local associations is transferred to MSC. Ex. 1485; CP 6776 at 56:8-12. The 10% fee does not include any interest or investment earnings. RP 9/16 6:19-7:6; RP 9/16 178:25-181:13; Ex. 1485 (Report at 7-8).

In July of each year, WBBT transfers to MSC the 10% fee to be paid to MSC pursuant to Article IV, Section 11 of the Declaration of Trust and Paragraph 4(b) of the enrollment agreements. Ex. 1485; App. 4 (Ex. 2027); App. 5 (Ex. 2227); CP 6776 at 56:13-20. The 10% fee does not include any interest or investment earnings. RP 9/16 6:19-22; RP 9/16 178:25-181:13; Ex. 1485 (Report at 7-8). At the same time, the amounts that are to be paid to the participants are transferred to MSC. Ex. 1485; RP 9/16 104:22-105:24; App. 6.

The funds transferred from WBBT to MSC in July are deposited in an MSC money market account that is linked to a checking account. Within two business days after this transfer, MSC writes checks to the approximately 6,000 participants and then delivers them to the local associations, which are responsible for delivering the checks to the participants. RP 9/15 120:5-121:20; RP 9/16 104:22-105:2; CP 6776 at 56:2-7. Funds are transferred into the MSC money market account prior to the time checks are delivered to the local associations to ensure that there is money available in the account to cover the checks. RP 9/15 120:5-10, RP 9/16 20:19-21:2; RP 9/16 105:18-106:5, 108:14-109:14.

At this time, net realized earnings on WBBT's investments from the prior calendar year are paid to the participants receiving their third and final adjustments. The net realized earnings distributed to all participants in the years 2004-08 were \$4,725,279.22. Exs. 214, 817, 826, 844, 1151.

Local associations distribute checks to their member participants through a combination of check distribution parties and mailings, usually during July. RP 9/13 147:25-148:4; RP 9/15 123:7-11, 124:21-125:6; RP 9/16 133:11-24. Typically, most participants cash their checks within a matter of weeks after MSC writes the checks. Ex. 1485. 97-98% of the money distributed by check in July is cashed by the end of August. RP 9/16 162:15-165:1; Ex. 1485.

MSC earns and retains interest on these funds while they are in the money market account awaiting presentation for payment by the participants' banks. RP 9/16 147:19-152:4, 157:5-13, 161:19-162:14. The amount of interest MSC earns is, to a significant degree, a function of the amount of time that passes between the day a participant receives its check and the day it deposits the check. RP 9/16 147:19-152:4, 157:5-13, 161:19-165:1; Ex. 1485.

The inbound and outbound interest retained by MSC is used to support the programs that BIAW and MSC provide on behalf of BIAW's members, including retro participants. RP 9/15 62:2-64:20.

V. ARGUMENT

A. The Trial Court Correctly Entered Summary Judgment Dismissing Plaintiffs' Marketing Assistance Fee Claims Because the Fee is Expressly Authorized.

On cross-motions for summary judgment, the trial court correctly entered judgment for State Defendants dismissing Plaintiffs' claims associated with the amount, use, and timing of the 10% marketing

assistance fee. Reviewing summary judgment de novo, this Court should affirm. *See Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 685, 202 P.3d 924 (2009).

Complying with obligations under a governing trust document does not breach a trust; it carries out the purpose of the trust. *See, e.g., Baldus v. Bank of Cal.*, 12 Wn. App. 621, 629-30, 530 P.2d 1350 (1975) (refusing to hold trustee liable for failure to diversify where trust document allowed him to retain stock of corporation held by trust); *In re Estate of Vance*, 11 Wn. App. 375, 382-86, 522 P.2d 1172 (1974). The parties disagree as to whether WBBT's Declaration of Trust or the enrollment agreements thousands of retro participants sign each year govern the trust, but the distinction does not matter for purposes of Plaintiffs' marketing assistance fee claims. As the trial court recognized, the plain language of both documents unambiguously authorizes the 10% fee (and not just a reimbursement of marketing costs).

1. The Enrollment Agreements and the Declaration of Trust Authorize Payment of the Marketing Assistance Fees.

Each and every year a company enrolls in BIAW's retro program, the company signs an enrollment agreement that sets out the fee structure for BIAW's retro program. *See* App. 5 (Ex. 2227). In Section 4(a), participants agree to pay a small up-front Member Enrollment Fee to BIAW equal to the greater of 1.5% of that participant's premium or \$150. *Id.* at 4. In addition, in Section 4(b), participants (1) explicitly authorize

the payment of “costs and expenses” of operating the program and explicitly (2) “*further authorize*[]” additional payments of 10% of any refund to BIAW and 10% to the local associations, over and above any reimbursement for expenses:

The Member further authorizes the Trustees to pay from the Premium Returns the balance of the Enrollment Fee and such costs and expenses for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer ten percent (10%) of the Participants’ Premium Returns applicable to the Coverage Period to local associations and 10% to BIAW for marketing and promotion of the Plan.

Likewise, the WBBT Declaration of Trust requires the trustees to (1) reimburse expenses BIAW incurs in administering the retro program and (2) pay BIAW and the local associations the marketing assistance fees in dispute in this lawsuit. *See* App. 4 (Ex. 2027) at 6 §§10–11. Sections 10 and 11 of the Declaration of Trust unambiguously provide:

Section 10. The Trustees *shall* pay or provide for the payment from the Funds of all reasonable and necessary expenses of BIAW or any other entity in administering the retrospective rating program on behalf of Employer Participants.

Section 11. Before distribution of the balance of each Fund left *after payment of all expenses* and final Adjustments by DLI, the *Trustees shall to [sic] pay to BIAW a marketing assistance fee of 10%* of all Employer Participants’ distributive shares of the Fund. In addition, the *Trustees shall pay to any local association with members who are Employer Participants in a Plan a marketing assistance fee of 10%* of the distributive share of the Fund allocated to Employer Participants who are members of such local association.

Id. (emphasis added).

According to Plaintiffs' argument, Section 4(b) of the enrollment agreement provides that WBBT may "transfer 20% . . . to BIAW and the local associations *only* 'for marketing and promotion of the Plan.'" Pet'rs' Br. 23 (emphasis added). That is, Plaintiffs contend that WBBT may pay the 20% fee mandated by the agreement only if it confirms that the amount paid will be spent by BIAW and the local associations only for marketing and promotion of the plan.

To accept such an interpretation, the Court would have to change the language of the enrollment agreement from "shall" to "may" to suggest that the payment is not mandatory, i.e., that some amount less than 10% may be appropriate. The Court would also have to add the word "only" to direct that the 10% may be used only as a reimbursement for marketing costs and expenses. Plaintiffs must rewrite the contracts to even state a claim. *See* CP 1489, App. 7 at CP 1510-13 (collecting Plaintiffs' testimony interpreting the contractual provision).

As the trial court recognized, Plaintiffs' reading is contrary to the plain terms of the contract. CP 5009-10. The express authorization for the payment of the 10% fee is unambiguous. *After* authorizing the payment of "costs and expenses for the operation and administration" of the program, the contract separately "*further authorizes*" BIAW's receipt of 10% of any refund in consideration for its marketing and promotion of the retro program. App. 5 (Ex. 2227) at 4 ¶ 4(b). Contrary to Plaintiffs'

strained reading, the clause “for marketing and promotion of the Plan” merely describes what the payment is for (as when one agrees to pay a teenager \$20 “for mowing the grass”). *See, e.g.,* BLACK’S LAW DICTIONARY 644 (6th ed. 1990) (defining “for” as “[i]n consideration for; . . . in exchange for; . . . as where property is agreed to be given ‘for’ other property or ‘for’ services.”); *Work v. United States ex rel. Rives*, 295 F. 225, 227 (D.C. Cir. 1924) (finding that in its “most general sense” “for” means “in consideration of” and describing how “[i]t is a very common thing to say that so much money was paid for this or for that, meaning thereby that it was the consideration passed for the thing mentioned”), *rev’d on other grounds*, 267 U.S. 175 (1925).

The trial court’s interpretation of the enrollment agreement not only comports with standard English usage (and the definition in BLACK’S), it is consistent with the language of the 1994 Declaration of Trust, set forth above, that governs WBBT. *Compare* App. 5 (Ex. 2227) at 4 ¶ 4(b) (enrollment agreement), *with* App. 4 (Ex. 2027) at 6 § 11.⁸

The language of the enrollment agreements and Declaration of Trust is unambiguous and must be enforced according to its plain terms.

⁸ After Plaintiffs filed their initial federal lawsuit, BIAW changed the language in subsequent enrollment agreements to make even clearer that the marketing assistance fee is paid in consideration for BIAW’s efforts and, therefore, is not subject to the restrictions Plaintiffs seek to impose. The agreements now read, “In consideration for their efforts in marketing and promoting the Plan, the Member Further authorizes the Trustees to pay ten percent” CP 2051 at § 4(b). The representatives of three Plaintiffs testified that they believe this new language means exactly the same thing as the previous language, further demonstrating that their arguments are subjective and unburdened by the actual language of the agreements. CP 2675-76 at 94:17-95:22; CP 2649-53 at 125:20-129:2; CP 2660-64 at 91:1-95:2.

Even if the language were deemed ambiguous, the extrinsic evidence uniformly supports the trial court's interpretation and provides an alternative basis to affirm the trial court's entry of summary judgment. *Rigg v. Lawyer*, 67 Wn.2d 546, 550-51, 408 P.2d 252 (1965); RESTATEMENT (THIRD) OF TRUSTS § 4, cmt. a (2003).

State Defendants submitted evidence of more than a decade of past practice by BIAW, MSC, and the local associations consistent with the plain terms of the enrollment agreements and the Declaration of Trust (e.g., CP 8803-09; CP 8887-88). State Defendants also submitted testimony regarding the intent and understanding of participants at the time they enrolled and signed the agreements and testimony about what participants were told by representatives of BIAW about the fee structure when they signed the agreements. *See* CP 1490-91; App. 7.

Additional overwhelming extrinsic evidence including media reports, BIAW member newsletters, and BIAW letters to participants, explains the amount, nature, and use of the fees.⁹ This evidence confirms State Defendants' longstanding interpretation, their conduct consistent with that interpretation, and notice to participants of that interpretation and conduct. *See Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 502, 115 P.3d 262 (2005); *Rigg*, 67 Wn.2d at 550-51.

⁹ E.g., CP 8795-8808 (McCabe Dec.); CP 8814-17, 8857-67 (newspaper articles and excerpts; CP 8819-21, 8841-55 (BIAW newsletters and articles); CP 8869-76 (letters to participants); CP 2085-2120 (newspaper articles); CP 2056-76 (newsletters).

2. Plaintiffs' Argument that the Marketing Assistance Fees Are a Breach of Trust Because they Exceed State Defendants' Actual Expenditures on Marketing is Immaterial and Wrong.

Plaintiffs try to avoid the mandatory language of the enrollment agreement and Declaration of Trust by arguing that even if the marketing assistance fees are authorized by those documents (and plainly they are), the fee is too high. Pet'rs' Br. 17–20. But this approach turns trust law on its head and is not a basis for reversing summary judgment.

Any arguments about the size of the fee are immaterial because the amount of the fee is expressly authorized by the enrollment agreements and by the Declaration of Trust. It is well-settled law that a trustee's actions cannot constitute a breach of trust if those actions are allowed or required by the governing trust instrument. *See, e.g., Baldus*, 12 Wn. App. at 629-30 (refusing to hold trustee liable for failure to diversify where trust document allowed him to retain stock of corporation held by trust).

Moreover, aside from the plain language of the documents, the only evidence as to the reasonableness of the amount of the fees is that they are consistent with or less than those charged by other retro programs. *See* CP 2818-21 ¶¶ 11–16; *see also* CP 9017-18 ¶ 7.

In any event, because of the unique and symbiotic relationship among BIAW, MSC, and BIAW's retro program, nearly everything BIAW does for its members (including its lobbying and political activity) either directly or indirectly promotes its retro program by attracting new members to the association and the retro program. CP 2817; CP 1915 at

129:12-130:1.¹⁰ BIAW's efforts to market and promote the retro program involve far more than mere advertising and direct marketing. BIAW's programs, including educational classes, legal services, legislative and political programs, and efforts to combat attacks on the retro program, all increase BIAW's membership and the pool for the retro program. CP 2815-17 ¶¶ 3-10.¹¹ The trial court correctly noted that "marketing and promotion" may be read broadly to encompass many activities. CP 5010.

In addition, "the proof [is] in the pudding." CP 2745 at 110:22. BIAW runs the largest retro program in the state (several times larger than the next largest construction industry program). CP 2818 ¶ 12. BIAW's program has had a 90% retention rate in a "very competitive marketplace, particularly in the construction retro programs out there." If BIAW were in fact charging too much, "everybody would go to one of [its] . . . competitor programs." CP 2745-46 at 110:25-111:4; *see also* CP 2677 at 117:4-13 (a fair price is what the market will bear).

3. Payment of the 10% Fee is Not "Self-Dealing."

Plaintiffs contend that payment of the marketing assistance fee to MSC constitutes self-dealing and is presumptively a breach of trust. That

¹⁰ Representatives of the local associations testified similarly. *E.g.*, CP 2754 at 47:9-17; CP 2762 at 35:8-19; CP 2773 at 22:1-3.

¹¹ Plaintiff SF McKinnon provides a concrete example of a retro participant that was first attracted to the association by one BIAW program but then learned of and joined the retro program. CP 2807-11 at 23:18-27:7.

is nonsense. Again, Plaintiffs fundamentally misconstrue the relationship and roles of the parties.¹²

The evidence in the record demonstrates, *without contradiction*, that BIAW sponsors a retro program to provide a benefit to members, reduce workplace injuries (and associated costs to members), *and* generate revenue for BIAW and the local associations (which is spent on other programs that are useful to members). From the beginning, the program was designed (by BIAW members) to accomplish these goals. CP 8803-04 ¶¶ 23–25; CP 8884-85 ¶¶ 6–7; CP 1896, 1933 at 55:7-12, 201:6-202:13 (“The program was set up by BIAW members for BIAW members . . . to provide a great service to our members and to provide revenue to BIAW and to the local associations”); CP 1956 58:3-60:3 (“I knew that we had a winner for all parties involved including the participants—you know, the members and associations—to generate large sums of money”); CP 9344 ¶9; *see also* CP 2822, 2827-31.

It was expected (and required) for there to be transactions between WBBT and BIAW (which is a WBBT beneficiary) or BIAW’s wholly owned subsidiary MSC, including payment of the marketing assistance fee. That is why the enrollment agreements and the Declaration of Trust expressly authorize the payment of the marketing assistance fee, the

¹² Plaintiffs wrongly assert, without any citation, that the WBBT trustees control MSC. Pet’rs’ Br. 20. The undisputed evidence is to the contrary, however. FF 3 (MSC is wholly-owned subsidiary of BIAW), FF 18 (BIAW chose to allocate responsibilities among BIAW, MSC, and WBBT); FF 28-31 (further describing relationship of State Defendants); *see Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010) (“Unchallenged findings of fact are verities on appeal.”).

reimbursement of costs and expenses, and a variety of other transactions between the parties.

Not surprisingly, the law allows for these types of arrangements. Where the trust instrument allows for such transactions, there is no question that they are permissible. *See In re Estate of Vance*, 11 Wn. App. at 385-86 (trustee can sell trust property to himself when authorized by the trust despite otherwise self-dealing nature of transaction); RCW 11.100.010 (“The specific requirements of this chapter [including limits on transactions with affiliates] may be expanded, restricted, eliminated, or otherwise altered by provisions of the controlling instrument.”).

Furthermore, it is undisputed that the unpaid volunteer WBBT trustees receive absolutely no financial gain as a result of these transactions. CP 2616 ¶ 4; CP 2620 ¶ 4; CP 2609 ¶ 4. There are no allegations whatsoever that the trustees are pocketing money or diverting trust assets for their personal financial gain. *See, e.g., In re Estate of Winslow*, 30 Wn. App. 575, 578, 636 P.2d 503 (1981) (“The important considerations in determining whether an executor has breached his fiduciary duty to the estate are whether he has used property of the estate to obtain a pecuniary benefit to himself”). There is no self-dealing.

4. The Timing of the Fee Payments is Consistent with the Terms of the Declaration of Trust and the Enrollment Agreements.

According to Plaintiffs, BIAW and the local associations’ receipt of the marketing assistance fees on the same schedule as participants

receiving their refunds (70% after the first adjustment, 20% after the second adjustment, and 10% after the third adjustment) is a breach of trust. Pet'rs' Br. 31. Plaintiffs' argument, however, is inconsistent with the language of the Declaration of Trust and the enrollment agreements, the original intent, and decades of practice.

First, as the trial court held, the plain language of the Declaration of Trust authorizes payment of the marketing assistance fee *before* refunds are distributed to participants—not after, as Plaintiffs contend. The Declaration of Trust states: “***Before distribution*** of the balance of each Fund left after payment of all expenses and final Adjustments by DLI, the Trustees shall to [sic] pay to BIAW a marketing assistance fee of 10%” App. 4 (Ex. 2027) at 6 § 11 (emphasis added). The provision protects BIAW (a WBBT beneficiary) by requiring the trustees to ensure there are sufficient funds available, after expenses and adjustments, to pay the marketing assistance fee, before participants receive distributions.

Second, Plaintiffs' argument contradicts the express terms of the enrollment agreements, which give WBBT the sole authority to determine when to distribute refunds and are silent as to when the marketing assistance fees should be paid. App. 5 (Ex. 2227) at 5 ¶ 6.

Third, Plaintiffs' argument ignores the original intent behind the marketing assistance fees by overlooking the unique relationship among the various parties. The program was intended to generate revenue for the association, increase workplace safety, and then provide an opportunity

for participants to earn refunds. CP 1956 at 58:3-59:2; CP 1896, 1914 at 55:7-12, 127:18-22, CP 4393 (1989 study on forming WBBT's predecessor setting forth the sequence of distributing funds and specifying that BIAW should receive the 10% fee prior to distributions to participants).

5. State Defendants Have Never Hidden the Fact that they Earned Revenue from the Marketing Assistance Fee.

Plaintiffs argue, without evidence, that State Defendants have hidden the profit-generating nature and the magnitude of the marketing assistance fee. Pet'rs' Br. 29-30. Their argument is both false and immaterial to whether the payment of the fee is required by the governing trust documents.

State Defendants collected and presented to the trial court evidence of many years of BIAW member communications and media reports explaining the importance of retro refund revenue to BIAW, including to its legislative and political efforts on behalf of members. *See, e.g.*, CP 1412-1420, 2056-2120. That BIAW generated a profit on its retro fees has been widely known. DLI tried in 1999 to cap the back end fees a retro program could earn, and when that attempt failed (struck down by the courts), legislators twice tried to pass bills limiting these fees. *E.g.*, CP 1412-14; CP 8927-28; CP 8947-56 at 50:9-10, 58:23-59:4.

In addition, during the course of the rulemaking process and in response to the subsequent legislative efforts to impose a similar cap, BIAW called out these attempts to interfere with its program in numerous

articles and letters to its retro participants. *E.g.*, CP 1412-19. In three letters in particular, BIAW expressly told all of its retro participants that it earned a profit if the program earned a refund: “if no refund is generated because the program performed poorly, then BIAW and its local associations would receive 20% of zero. The association only *makes a profit* if its members get a refund.” CP 8963-64 (2000 letter), CP 8992-93 (2002 letter), CP 8996-98 (2005 letter) (emphasis added).

B. The Trial Court Erred in Determining that the Enrollment Agreement Is a Governing Trust Instrument.

The trial court erred in determining that the enrollment agreements signed each year by thousands of retro participants are trust instruments. CP 5006-07.¹³ The trial court’s determination was based on its erroneous conclusion that retro participants are the settlors or creators of WBBT, who formed the trust by signing enrollment agreements and contributing their interest in any refund from DLI to the trust. The court’s decision on summary judgment is reviewed de novo and should be reversed. *Wash. State Major League Baseball Stadium*, 165 Wn.2d at 685.

First, the court erred in determining that retro participants are the settlors of WBBT. CP 5006-07. The court’s error arises from its

¹³ The error does not affect the trial court’s ruling on the marketing assistance fee issue because the trial court correctly recognized that the fee is authorized by the plain language of both the enrollment agreement and the Declaration of Trust. CP 5009-10. The issue is relevant, however, to defining the scope of the trust (and, therefore, of any trust accountings); the relationship between BIAW and retro participants; Plaintiffs’ claims for interest (discussed in section V.C.1); the applicability of exculpatory provisions (discussed in section V.F); and the legal standard for awarding attorneys’ fees (discussed in section V.H).

determination that the participants own the refunds DLI pays to BIAW. CP 5007. According to DLI regulations, however, the “refund is the property of the group sponsor.” WAC 296-17B-200.¹⁴ In addition to the regulations, the Declaration of Trust and the enrollment agreements confirm that the participants have no interest in any funds unless and until WBBT declares a distribution of the funds within WBBT’s control.¹⁵ Thus, BIAW, not the participants, is the settlor. BIAW created and funds WBBT with the refunds BIAW receives from DLI. *E.g.*, RP 9/15 56:15-57:6; RP 9/15 113:1-3; App. 4 (Ex. 2027) at 1. Therefore, (1) participants did not have a property interest in the refunds; (2) participants could not be settlors of a trust holding the refunds (because they did not have a property interest in the refunds to convey to establish the trust); and (3) the enrollment agreements are not trust instruments (because they do not establish the trust).

The court’s error in determining that participants own refunds from DLI is also evident from a review of other regulations. Under WAC

¹⁴ WAC 296-17B-200 was adopted shortly after trial. The chapter was “rewritten to better conform to the statute, chapter 51.18.RCW, and to improve the overall order and clarity.” Dep’t of Labor and Indus., WSR 10-21-086 (Permanent Rules) at 1 (Oct. 19, 2010). The new language improved clarity but did not change the meaning of the WAC. The former regulations also stated that “[a]ll retro group refunds are paid directly to the sponsoring organization.” WAC 296-17-90445 (2010).

¹⁵ CP 1622 ¶ 6 (“*The Member shall have no legal right or entitlement* to any portion of said sums or any interest or benefit accruing from the investment of any such sums, until such time as the Trust, in its sole discretion, declares a distribution of any portion of the Premium Return to Participants.”) (emphasis added) ; App. 4 (Ex. 2027) at 8 § 1 (“*No share or interest* or any portion thereof of any Employer Participant hereunder *shall vest* until actually paid to such Employer Participant”) (emphasis added).

296-17-90410, the group sponsor (not individual participants) is liable to DLI for any assessments. If a sponsoring organization sponsors multiple retro groups, one of which earns a refund and the other owes additional premiums, ***DLI can deduct the additional premiums owed by one group from the refund due to the other group.*** WAC 296-17-90445 (2010). If participants had an ownership interest in the DLI refunds, as the trial court held, such a deduction by DLI would be an unconstitutional taking of property from the participants in one group to satisfy obligations owed by participants in a different group. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002) (“When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . .”). It was plain under the old regulations (and now expressly so under the new regulations) that the sponsor, not the participant owns any refunds.¹⁶

Second, the enrollment agreements cannot govern the obligations of the WBBT trustees because the trustees are not parties to the enrollment agreements. They never consented to serve as trustees of a trust governed by enrollment agreements. CP 2616 at ¶ 2; CP 2620-21 at ¶ 5; CP 2609-10 ¶¶ 5-6; CP 2009-10 at 108:11-109:5; *see Laughlin v. March*, 19 Wn.2d

¹⁶ Plaintiffs rely on dicta in *Northwest Independent Forest Manufacturers v. Department of Labor & Industries*, 78 Wn. App. 707, 899 P.2d 6 (1995). *Northwest Independent Forest Manufacturers* discussed the retro regulations in effect in 1985-86, which contained none of the provisions on which State Defendants rely.

874, 879, 145 P.2d 549 (1944) (applying California law) (“acceptance of the trust by the trustee” is one of the “five essential elements of every valid, voluntary trust”); *see also Flitcroft v. Comm’r*, 328 F.2d 449, 458 (9th Cir. 1964) (“A declaration of trust constitutes a contract between the trustor and the trustee for the benefit of a third party.”).

Third, Plaintiffs have conceded that they did not intend to create a trust when executing the enrollment agreements and that they did not create WBBT.¹⁷ Plaintiffs cannot be settlors of WBBT if they lacked the intent to create WBBT. *Hoffman v. Tieton View Cmty. Methodist Episcopal Church*, 33 Wn.2d 716, 726, 207 P.2d 669 (1949) (“Before a trust will be found to exist, there must be a clear manifestation thereof.”); *see also Laughlin*, 19 Wn.2d at 879 (one of the “five essential elements of every valid, voluntary trust” is the “intention to create the trust.”).

C. The Trial Court Erred in Determining that MSC’s Retention of Interest Was a Breach of Trust.

The trial court erred in holding that MSC’s retention of interest earned on funds in transit, both before they are delivered to WBBT (inbound) and after they are transferred from WBBT for the purpose of distribution to participants (outbound), is a breach of trust. CP 5011-12, CL 3. The trial court’s decision is reviewed de novo. *Wash. State*

¹⁷ *See* CP 2654 at 182:10-12 (“You didn’t set up the trust, did you?” “No.”); CP 2665-66 at 167:22-168:8 (“Is it your contention that RE Sources established the Washington Builders Benefit Trust?” “No, it is not.” . . . “Who do you understand established the trust?” “I thought that the trust was established by the Building Industry Association of Washington.”); CP 2674 at 79:12-15 (“Well, did you establish the Washington Builders Benefit Trust? Did Living Space?” “No.”).

Baseball, 165 Wn.2d at 685; *Burndridge v. Fluor Fed. Servs. Inc.*, 164 Wn.2d 432, 441 n.2, 191 P.3d 879 (2008) (conclusions of law reviewed de novo even when styled as findings of fact).

1. MSC May Earn and Retain Inbound Interest.

RCW 11.104A.070(b) provides: “An asset becomes subject to a trust on the date that it is transferred to the trust” As discussed in section V.B, interest earned on refunds BIAW receives from DLI before the funds are deposited with WBBT is not yet transferred to a trust and, therefore, not yet subject to a trust. MSC is entitled to retain interest it earns on amounts not yet subject to a trust. Furthermore, even if the funds were subject to the trust, the amounts are de minimis and, for the reasons set forth in section V.C.2.a below, are not recoverable.¹⁸ MSC’s retention of interest and commingling of DLI refunds with other MSC funds is not a breach of trust. CP 5011-12.

2. MSC May Earn and Retain Outbound Interest.

MSC’s retention of a de minimis amount of interest on the disbursement of retro refunds to participants is not a breach of trust. Both the Declaration of Trust and enrollment agreements give the trustees a great deal of discretion regarding the system for distributing any refunds. *See* App. 4 (Ex. 2027) at 5 § 2; App. 5 (Ex. 2227) at 4 ¶ 6; *see also* App. 4 (Ex. 2027) Art. II §§ 1.B-C, Art. IV § 17; App. 5 (Ex. 2227) at 4 ¶ 3. The

¹⁸ The average amount of inbound interest MSC earned was \$2.08 per participant per year, about 3/10,000 of the amount transferred from DLI to BIAW from 2004-08. Ex. 1485 (Report at 5); RP 9/16 141:2-142:13.

distribution system they adopted relies on MSC to process the distributions and permits MSC to earn and retain interest while the funds are in transit.

a. There is no claim for de minimis amounts.

Plaintiffs may not recover the inbound interest because the law does not impose liability for the de minimis amounts at issue. *See Erickson v. Erickson*, 30 Wn.2d 914, 921, 194 P.2d 954 (1948); *Breaks v. Spokane Auto Co.*, 93 Wash. 143, 144, 160 P. 291 (1916); *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 296, 38 P.3d 1024 (2002).

The amount of interest MSC earned on funds distributed to the five Plaintiffs during each of the years 2004-08 ranged from 14¢ to \$62.08, for a grand total of \$300.92 for all five years combined. The \$300.92 of interest earned by MSC was equal to 0.26% of the \$116,527.29 in refunds and investment earnings distributed to the five Plaintiffs during those five years.¹⁹ Ex. 1485 (Report at 5).

WBBT, with the assistance of MSC, distributed nearly \$140 million to all participants during the years 2004-08. While waiting for participants to deposit their checks, MSC earned interest of \$361,352, about \$11.91 per participant per year, or about 0.26% of the amount distributed. Ex. 1485 (Report at 6-7); RP 9/16 157:5-162:4. These amounts fall under the rule of de minimis non curat lex; the law does not provide a recovery for them. *See Sorrel*, 110 Wn. App. at 296 (affirming

¹⁹ The specific amounts are set forth in appendix 8.

dismissal of plaintiff's claim for six weeks of accrued interest on funds held in trust by nursing facility "because the law does not deal with trifles"); *Erickson*, 30 Wn.2d at 921; *Breaks*, 93 Wash. at 144.²⁰

Indeed, the amounts are so small that they cannot justify the cost and administrative burden of calculating the amount each participant would be due. The cost of processing a second distribution check to each participant would be significant, likely exceeding the amount of the interest. *See* RP 9/16 228:6-8. Under such circumstances, the law does not impose an obligation to calculate or pay interest. *See, e.g., In re Morgan Guar. Trust Co.*, 396 N.Y.S.2d 781, 787 (Sur. Ct. 1977) (trustee not required to make reimbursements to trusts when "the estimated expenses entailed in reimbursing the withdrawn trusts the sums to which they are entitled would far exceed the sums in issue"); WAC 296-17-90455 (permitting DLI to withhold small retro refunds, to be applied against the next year's premium, rather than incur expense of writing check; making no provision for payment of interest); *cf. Finkelstein v. Finkelstein*, 502 A.2d 350, 353-54 (R.I. 1985) (trustees not required to prepare annual accounting when benefit of doing so not justified by cost); *Cohan v. Alvord*, 162 Cal. App. 3d 176, 183-84, 208 Cal. Rptr. 421 (1984)

²⁰ *See also In re Ambanc Le Mesa Ltd. P'ship*, 115 F.3d 650, 654-56 (9th Cir. 1997) (rejecting proposed contribution of \$32,000 per year, representing 0.5% of unsecured debt, "because it is de minimis as a matter of law"); *Carder Buick-Olds Co. v. Wooten*, 308 S.W.3d 156, 159-60 (Ark. Ct. App. 2009) (judgment creditor not entitled to interest beyond date when judgment debtor offered payment to satisfy judgment); *Druskin v. Answerthink, Inc.*, 299 F. Supp. 2d 1307, 1329 (S.D. Fla. 2004) (proxy's failure to disclose \$1.75 million of revenue from related party transaction was de minimis when that revenue represented only 0.67% of total revenue).

(rejecting challenge to statute providing that tax collectors need not pay interest on refunds when interest would be less than \$10; legislature was entitled to consider administrative cost of calculating interest compared with amount of the interest).

b. The interest MSC retains is reasonable compensation to MSC for the services it performs.

WBBT has no staff to process distributions. Hiring staff or a third party would be expensive and would diminish funds otherwise available to invest for the benefit of WBBT's beneficiaries. *See* CP 8301-02 ¶ 13. In contrast, MSC administers the retro program, has knowledgeable staff, and has the expertise to handle the job. And MSC is the subsidiary of BIAW, the party that entered into the enrollment agreements with the participants. Under these circumstances, it is more than reasonable for WBBT to rely on MSC to process distributions to participants and to keep the interest as compensation for services. The Declaration of Trust and the enrollment agreements entitle the WBBT trustees to pay MSC for the services MSC performs for WBBT, including the distribution of payments to the participants, and also for administering the retro program. App. 4 (Ex. 2027) at 6 §§ 9,10; App. 5 (Ex. 2227) at 4 ¶ 3. As a historical matter, however, MSC has retained interest on funds it processes on their way to or from WBBT, but has not separately charged WBBT for its services. Participants would, in fact, receive less money if MSC charged separately

for its services but did not retain interest. *Compare* CP1683-84 with Ex. 1485 (Report at 5, 7).

Additionally, participants receive another benefit that more appropriately belongs to MSC and to the local associations: the earnings on the portion of the 10% Marketing Assistance Fees that WBBT holds pending distribution to MSC and the local associations. From 2004 to 2008, the earnings from the Marketing Assistance Fees held by WBBT exceeded the interest earned by MSC. *See* Ex. 1485 (Report at 5-8). Participants are better off under the status quo than if Plaintiffs obtain the relief they seek.

c. Retention of interest earned while processing distributions is a usual and customary practice.

MSC's retention of interest is consistent with industry practices and is lawful. "A trustee is allowed to keep on hand cash necessary to pay upcoming expenses of the trust" and "[t]he trustee need not pay interest on such funds." *Van de Kamp v. Bank of Am.*, 204 Cal. App. 3d 819, 853, 251 Cal. Rptr. 530 (1988) (trustees did not breach fiduciary duties by keeping interest earned between time it issued checks and time beneficiaries cashed those checks). Trust companies routinely retain interest on float and treat it as part of their compensation. CP 1684 & 1694 (Wells Fargo's statement of custom regarding float); CP 8302 (Stordahl Dec.) (retention of float interest is "a usual and customary practice in the financial services industry whether the firm is a trust company, brokerage, or a bank").

d. Participants failed to mitigate to the extent MSC earned interest after they could have deposited their checks.

MSC cannot be liable for interest accruing due to participants' delays in cashing their checks. MSC issues more than 6,000 refund checks annually, usually within two business days of its receipt of funds from WBBT. RP 9/15 120:18-121:13. The amount of the refund is fixed when the checks are made. Local associations then promptly distribute the checks to participants. The interest accrued thereafter is primarily a function of the time it takes participants to cash their checks. Exs. 1493 (Exhibit 2, Tab 4), 1224, 1485. For example, during three of the five years in question, ReSources for Sustainable Communities (which has the largest claim, for \$145.77) took more than a month to deposit its check. To the extent interest is earned by virtue of a participants' own delay in cashing its check, the participant may not assert a claim for that amount.²¹

²¹ *E.g., Brinson v. City of New York*, 795 N.Y.S.2d 553, 554 (App. Div. 2005) (“[D]efendants should not be held responsible for interest . . . where the delay in payment was not their fault.”). State Defendants may not be held liable to Plaintiffs for purported injuries that are within the control of Plaintiffs. *See, e.g., Senn v. Nw. Underwriters, Inc.*, 74 Wn. App. 408, 414, 875 P.2d 637 (1994) (plaintiff must establish proximate causation of losses from alleged breach of fiduciary duty); *Carder Buick-Olds*, 308 S.W.3d at 159-60; *Wachovia Bank of Ga., N.A. v. Namik*, 620 S.E.2d 470, 473 (Ga. Ct. App. 2005) (refusing to award damages where interest accrued on the estate as a result of the beneficiary’s delay); *Banks v. Banks*, 648 So. 2d 1116, 1127–28 (Miss. 1994) (denying damages for interest that accrued as a result of party’s own delay, and noting that “[i]t seems contrary to established principles of recovery to allow the meter to continue to run and then be able to charge this to the opposing party”).

D. The Trial Court Appropriately Exercised its Discretion to Not Order Monetary Relief.

The trial court considered the witnesses and evidence presented at trial and properly recognized that it had “broad discretion to fashion appropriate equitable relief.” CL 8. The trial court also noted that “petitioners have disclaimed any right to money damages in this case and seek only equitable relief.” *Id.*²² Plaintiffs cannot demonstrate that the trial court abused its discretion in fashioning only a prospective remedy for minor, technical breaches. *E.g., Farmer v. Farmer*, 172 Wn.2d 616, 624, 259 P.3d 256 (2011) (trial court’s choice of remedy in equitable action reviewed for abuse of discretion).²³

²² Plaintiffs do not assign error to Conclusion of Law 8. They conceded at trial that they were not seeking money damages. RP 9/13 14:4-7 (“We are asking the Court for purely equitable relief in this case, as, Your Honor, we’re not seeking damages for the individual petitioners.”). Plaintiffs’ status as *former* participants of BIAW’s retro program participants undermines their standing to seek prospective equitable relief. *See* FF 4 (“Petitioners are . . . no longer enrolled in the program.”); *State ex rel. Hays v. Wilson*, 17 Wn.2d 670, 672, 137 P.2d 105 (1943) (“[T]o maintain a cause of action to enforce private rights . . . [one] must show that he has some real interest in the cause of action . . . and he must show that he will be benefited by the relief granted”). As former members, their claims are limited to individual damages – which Plaintiffs have disclaimed.

²³ *See also Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003) (“Sitting in equity, a court may fashion broad remedies to do substantial justice to the parties and put an end to litigation”); *Sorrel*, 110 Wn. App. at 296 (affirming dismissal of plaintiff’s claim for six weeks of accrued interest on funds held in trust by nursing facility “because the law does not deal with trifles”); 4 AUSTIN SCOTT ET AL., SCOTT & ASCHER ON TRUSTS §24.9, at 1693 (5th ed. 2007) (“The trustee is not subject to surcharge for a breach of trust that results in no loss to the trust estate.”); RESTATEMENT (SECOND) OF TRUSTS §§ 179 cmt. d (trustee not liable for breach that “is merely a technical breach of trust”), 205 cmt. g (“[A] court of equity may have power to excuse the trustee in whole or in part from liability where he has acted honestly and reasonably and ought fairly to be excused.”) (1959).

1. State Defendants Acted with Good Faith and Honest Judgment.

There is no evidence in the record to indicate that any State Defendant acted in bad faith, dishonestly, or with any intent to defraud or to seek unconscionable advantage. *Morris v. Swedish Health Servs.*, 148 Wn. App. 771, 777, 200 P.3d 261 (2009) (defining “good faith” as the absence of these qualities). None of the trustees and none of their companies profited from their service as trustee. *E.g.*, RP 9/15 61:5-13; RP 9/14 118:21-119:5; RP 9/16 111:19-22. No decision by any trustee or any other defendant resulted in a benefit to the trustees or their companies that did not also inure to the benefit of all other retro participants. *E.g.*, RP 9/15 60:12-61:13; RP 9/14 119:6-13; RP 9/16 110:10-111:25. The interest retained by MSC compensated MSC for its services and was used to fund valuable programs for participants and other BIAW members. (RP 9/15 62:2-64:20.)²⁴

State Defendants’ witnesses testified, without contradiction at trial, that while they thought the retro refunds (and thus the interest earned by MSC on them) were not trust funds (because they were outside of WBBT) (RP 9/13 95:2-10), they were also generally aware that (1) both the Declaration of Trust (at Article IV, sections 9 and 10) and the enrollment

²⁴ Even Plaintiff A-1 Builder’s owner testified that programs offered by the association were invaluable. For example, he testified that there “are educational programs that are invaluable, things like lead, safety” in addition to a health insurance plan and a Built Green program, all of which caused him to remain a BIAW member despite his objections to the association’s political speech. CP 8562.

agreements (at section 3 and 4(b)) authorized the trustees to hire and pay others to assist them in performing their tasks (RP 9/15 68:15-72:7); (2) BIAW was a beneficiary of the trust (RP 9/15 67:3-9); (3) MSC was not separately invoicing WBBT for the services it performed for WBBT (RP 9/14 45:11-22), and (4) MSC's retention of interest (in an amount less than the value of the services) seemed reasonable (RP 9/14 95:25-96:13). The evidence also showed that, while BIAW was entitled to payment of its share of the marketing assistance fee immediately upon receipt of refunds from the state, it allowed those funds to be held by WBBT (and thus earn substantial investment income for the trust and the participants, its beneficiaries) and distributed on the same schedule as refunds were distributed. The court appropriately declined to order a monetary remedy because it recognized that State Defendants acted in good faith and with honest judgment. *E.g.*, FF 37, 42, 50; CL 9.

2. For the Same Reasons Retaining Minimal Interest is not a Breach, No Award of Money is Justified.

The court's equitable decision to award prospective relief rather than a retrospective monetary remedy is further supported by the same considerations set forth above in section V.C.2:

First, the amount of money involved is de minimis. RP 9/16 142:2-143:11, 153:21-154:16; Ex. 1485. As discussed in section V.C.2.a, these amounts are legally insufficient to support a claim for monetary recovery.

Second, any claim for damages would be subject to an offset by MSC for the value of the services it performed for WBBT. RP 9/15 101:23-102:25, 112:21-116:12, 118:24-121:20, 125:19-129:17, 131:1-134:13; *Young v. Young*, 164 Wn.2d 477, 485, 191 P.3d 1258 (2008); 66 AM. JUR. 2D *Restitution and Implied Contracts* § 37 (2001). Such an offset may be awarded “regardless of whether there was a breach of a fiduciary duty.” *Sherwood B. Korssjoen, Inc. v. Heiman*, 52 Wn. App. 843, 849, 765 P.2d 301 (1988); *see also Leppaluoto v. Eggleston*, 57 Wn.2d 393, 405, 357 P.2d 725 (1960); *Williams v. Queen Fisheries, Inc.*, 2 Wn. App. 691, 698-99, 469 P.2d 583 (1970).

Third, as discussed in section V.C.2.d, a significant portion of the outbound interest is earned as a result of participants’ failures to promptly cash their checks. The court appropriately declined to award a monetary remedy that would compensate participants for their own failures.

3. Plaintiffs’ Only Monetary Claim is for Damages, Which Plaintiffs Waived.

The monetary relief Plaintiffs seek is damages not equitable relief. WBBT is a pass-through trust. If the Court orders that interest retained by MSC over the years must be transferred to WBBT, those funds will be distributed to *future* beneficiaries, not retained by the trust. In contrast, Plaintiffs seek a transfer of money from MSC to Plaintiffs and other *past* participants. That is the essence of an award of damages, not the restoration of a trust asset to the corpus of a trust. Washington courts recognize the difference and do not allow a party to assert others’ damages

claims under the guise of “restoring” funds to a trust. *See Kelly v. Foster*, 62 Wn. App. 150, 154, 813 P.2d 598 (1991) (citing *Allard v. Pac. Nat’l Bank*, 99 Wn.2d 394, 400, 663 P.2d 104 (1983)) (“[A] distinction [exists] between cases where the plaintiff seeks an immediate recovery for himself, as distinguished from those cases where a beneficiary of a trust sues the trustee in order to restore funds to the trust.”). If Plaintiffs had a claim for monetary relief, it was limited to individual damages.²⁵ But Plaintiffs expressly disclaimed any claim for damages. CL 8. They are not, therefore, entitled to any monetary relief.

E. Plaintiffs Have Waived the Remaining Assignments of Error.

Plaintiffs failed to present argument supporting their assignments of error C2, C4, C6, and C7. Accordingly, those assignments are waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d. 801, 809, 828 P.2d 549 (1992) (assignment of error waived where “plaintiffs present no argument in their opening brief” supporting the assigned error); *Escude ex rel. Escude v. King Cnty. Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003) (“It is well settled that a party’s failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate

²⁵ Plaintiffs initially pled class claims and moved for class certification. After State Defendants opposed class certification by providing 74 declarations of other retro participants objecting to Plaintiffs’ claims and demonstrating that Plaintiffs are a discrete minority of retro participants who are unhappy with State Defendants, Plaintiffs withdrew their class certification motion. CP 9073-9409. Eventually, Plaintiffs dismissed their class allegations. CP 7185, 7190-91; *see* CP 8742-43. Plaintiffs represent only themselves. They do not represent a class and they do not represent other participants.

consideration of an alleged error.”); RAP 10.3(a)(6) (opening brief must contain “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.”). Plaintiffs’ passing reference in a footnote to assignment of error “E” fails to satisfy the argument and authority requirement. *See Hubbard v. Spokane Cnty.*, 146 Wn.2d 699, 705 n.7, 50 P.3d 602 (2002) (“Because these incidents were only raised in a footnote, we need not consider them when evaluating Hubbard’s claims”); *accord St. Joseph Gen. Hosp. v. Dep’t of Revenue*, 158 Wn. App. 450, 472-73, 242 P.3d 897 (2010).

F. The Trial Court Erred by Declining to Give Full Effect to Exculpatory Provisions in the Enrollment Agreements and Declaration of Trust.

The exculpatory provisions in the controlling documents protect State Defendants from liability for mistakes or errors of judgment of the kind asserted in this case. The Declaration of Trust provides:

The Trustees shall not be liable for any mistake or error of judgment in the administration of the Trust, except for willful misconduct, so long as they continue to exercise their duties and powers in a fiduciary capacity primarily in the interests of BIAW, the local associations, and the Employer Participants.

App. 4 (Ex. 2027) at 7 § 17. The enrollment agreements provide:

[t]he member hereby releases and agrees to indemnify and hold BIAW, its subsidiary [MSC], the Trust and all of the members of the Trust harmless from any and all liability for any decision which may now or hereafter by [sic] made by BIAW, its subsidiary, or the Trust with regard to the Plan, any Premium Returns (including interest, principal and profit), the payment of any such sums or the investment of any such sums.

App. 5 (Ex. 2227) at 5 ¶ 10.

The provisions are enforceable, subject only to the limitation that they are not effective to relieve trustees from the duty to act in good faith and with honest judgment. RCW 11.97.010 (provisions of trust may relieve trustees from duties and liabilities so long as trustees “act in good faith and with honest judgment”); see also 1 AUSTIN SCOTT ET AL., SCOTT & ASCHER ON TRUSTS § 2.2.4, at 42 (5th ed. 2006) (“For the most part, the settlor, in creating a trust, can make such provisions with respect to the duties and powers of the trustee and rights of the beneficiaries as the settlor wishes.”). The trial court properly recognized that State Defendants acted in good faith (*e.g.*, FF 17, 37, 39, 42, 50, 54, 57; CL 9) but erred in not providing State Defendants the protections of the exculpatory clauses. Enforcement of the exculpatory provisions is an alternative basis for rejecting Plaintiffs’ assignments of errors and accepting State Defendants’ assignments of error.

G. The Trial Court Erred by Determining that All State Defendants Breached the Trust by the Actions of Only Some State Defendants.

Conclusions of Law 3, 4, 5, and 11 all improperly lump State Defendants together and hold parties liable for breaches they did not commit. These errors are all subject to de novo review. *Burndridge*, 164 Wn.2d at 441 n.2.

CL 3 concludes that “*Defendants* violated *their* duties under the trust when *they* retained interest . . .,” but all the evidence in the record

and Findings of Fact show that MSC, not BIAW or WBBT, handled and retained the interest. *See* FF 29, 30, 35, 37. CL 4 addresses the Court's determination that MSC's commingling of inbound and outbound retro refunds with other MSC funds was a breach of trust. Again, all of the evidence at trial and relevant Findings of Fact show that MSC and not BIAW or WBBT acted. *See* FF 52. CL 5 suffers from a similar error. The court concluded that "Defendants violated their duties under the trust when they failed to provide annual accountings," but the evidence shows that only WBBT had a duty to perform accountings. FF3 (identifying 7 WBBT trustees as distinct from MSC or BIAW); RCW 11.106.020 (imposing annual accounting obligation on "trust or trustees"). CL 11 also fails to distinguish between State Defendants in referring to future handling of the interest, commingling, and accounting practices. Because (1) the interest and commingling practices involve MSC, (2) the accounting practice involves WBBT, and (3) none of those practices involves BIAW, the trial court erred by including BIAW among the State Defendants whose practices were being modified.

H. The Trial Court Appropriately Denied Plaintiffs an Award of Attorneys' Fees and Costs but Erred in Failing to Award State Defendants their Attorneys' Fees and Costs.

Over the course of four years of aggressive litigation in federal and state court, Plaintiffs failed to achieve any of their main objectives:

- (1) They dropped the first federal suit, brought to stop BIAW's use of Marketing Assistance Fee revenue on political speech, after the judge expressed skepticism

and dismissed the state law claims (*see* CP 7996-8000; CP 8018);

(2) They failed to obtain an injunction prohibiting BIAW from spending Marketing Assistance Fee revenue on political speech (just prior to the 2008 election) (CP 7190);

(3) They dropped their Consumer Protection Act and Class Certification claims (after the court asked about setting a deadline for CR 23 motions) (CP 7190-91);

(4) They lost their \$38 million claim regarding the Marketing Assistance Fee on summary judgment (App. 3); and

(5) After years of claiming tens of millions in damages, at trial they disclaimed any interest in any damages at all (CL 8).

Plaintiffs, having lost on their central theory and having abandoned their claims for damages, are not entitled to attorneys' fees and costs.

State Defendants, having operated an unquestionably successful retro program and trust for many years, having always acted with good faith in the best interests of the beneficiaries, and having prevailed on all but the most technical and trivial of Plaintiffs' many, many claims, have successfully defended the trust and the interests of the non-participating beneficiaries. State Defendants are the substantially prevailing parties entitled to recover their reasonable attorneys' fees.

RCW11.96A.150 vests expansive discretion in the trial court to equitably award (or not award) fees based on any relevant factors:

The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. ***In exercising its discretion under this section, the court may consider any and all factors***

that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

RCW 11.96A.150(1) (emphasis added). The legislature enacted this provision in 2000 and amended it most recently in 2007 to include the bold language. Most of the authorities, such as the *Allard* case, cited by Plaintiffs pre-date the amendments by decades.

Exercising the broad discretion vested in it by the statute, the trial court considered the entire history of the litigation and denied fees to Plaintiffs. *See* Fees FF 1, 5, 6, 9; Fees CL 10–11. Plaintiffs cannot show a “clear abuse of discretion.” *Bartlett v. Bellach*, 136 Wn. App. 8, 22, 146 P.3d 1235 (2006).

First, Plaintiffs are not prevailing parties. They lost on every major issue. As the trial court observed, “Petitioners were awarded no damages or other financial recovery in this case . . . [and] “there were many, many issues in this case in which the Petitioners did not prevail.” Fees FF 6; *see* Fees FF 5 (“Defendants prevailed” on Plaintiffs’ many failed claims). *See, e.g., Endicott v. Saul*, 142 Wn. App. 899, 929, 176 P.3d 560 (2008) (awarding fees pursuant to RCW 11.96A.150 to “prevailing parties” on appeal); *Bartlett*, 136 Wn. App. at 22 (fees to the “only prevailing party”); *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 772, 115 P.3d 349 (2005). When both sides have prevailed on some issues, courts determine which side substantially prevailed and

award fees accordingly. *E.g., Crest*, 128 Wn. App. at 772.²⁶

Second, State Defendants' defense, not Plaintiffs' claims, benefitted the trust. The trustees here "conferred a benefit on the trust" when they successfully defended their "right to continue administering the trust." *See In re Estate of Morris*, 89 Wn. App. 431, 434, 949 P.2d 401 (1998). State Defendants also vindicated the interests of the overwhelming majority of trust beneficiaries who opposed Plaintiffs' claims.²⁷ Furthermore, unlike most cases decided under TEDRA, which concern irrevocable documents, the enrollment agreements associated with BIAW's retro program can (and do) change from year to year.²⁸ The trust at issue here is fundamentally a business arrangement. As a result, any "benefit" conferred by Plaintiffs is illusory since the court's order concerns a program and documents that State Defendants remain free to modify. Plaintiffs' lawsuit was for their own benefit, not the benefit of others.

Third, Plaintiffs conducted the litigation vexatiously, a fact courts may take into account to deny fees. *Allard v. Pac. Nat'l Bank*, 99 Wn.2d

²⁶ Even when the trial court identified technical violations and ordered State Defendants to modify their practices, it emphasized that State Defendants acted in good faith for the benefit of the retro program participants. FF 37, 42, 50; CL 9.

²⁷ *See, e.g.*, CL 10 ("[T]he Petitioners represent only five out of thousands of employer participants and ... at least eight other employer participants have implores the court to deny any relief"); CP 9073-9409 (declarations of 74 beneficiaries who opposed Plaintiffs' goals and lawsuit).

²⁸ The pool of thousands of beneficiaries changes from year to year, too, further distinguishing this case from typical TEDRA litigation.

394, 407, 663 P.2d 104 (1983); *In re Estate of Ehlers*, 80 Wn. App. 751, 764, 911 P.2d 1017 (1996) (approving denial of fees to beneficiaries who “primarily pursue their action for their own benefit”). Plaintiffs unnecessarily prolonged the litigation and greatly increased its cost. CP 7193-7203 (detailed history of actions by Plaintiffs that increased costs and prolonged resolution of purely legal issues). What started as an effort to silence political speech with which Plaintiffs disagreed, *see, e.g.*, CP 7975, became a desperate attempt to establish some minor technical breach to serve as a longshot basis for seeking attorneys’ fees.

Fourth, given the Court’s findings that the ***volunteer*** trustees made sound investment decisions that returned millions of dollars in investment earnings to plan participants, did not personally benefit from any of the conduct in issue, did not understand that trust duties applied to funds that were in the process of being transferred by MSC, and did not harm the participants through any lack of supervision, it would be inequitable to award fees against them. *See* FF 37, 42, 50, 55, 66.

Fifth, under Washington law, a court may decline to award fees when a suit involves difficult, novel and unique issues. *See, e.g., In re Estate of D’Agosto*, 134 Wn. App. 390, 402, 139 P.3d 1125 (2006) (declining to award fees under RCW 11.96A.150 in case involving “difficult questions” and “novel issues”); *In re Estate of Burks*, 124 Wn. App. 327, 333, 100 P.3d 328 (2004) (“difficult questions” and “unique issues”). The trial court here reasonably based its denial of fees upon the

unique nature of the facts of this case. Fees CL 5 (“[T]his case is a very unique case even within the context of TEDRA cases, which are in and of themselves unique cases.”); *see also* Fees CL 6, Fees FF 2.

Sixth, in addition to the reasons set forth above that State Defendants should be awarded their fees and costs under TEDRA, State Defendants are entitled to their attorneys’ fees and costs under the enrollment agreements.²⁹ In the enrollment agreements, Plaintiffs agreed to “pay all legal fees and costs incurred by the Trust of BIAW in any action or proceeding . . . [to] enforce the Member’s obligations.” App. 5 (Ex. 2227) at 5 ¶ 9. State Defendants successfully defended against virtually all of Plaintiffs’ claims and defended their ability to enforce their rights under the enrollment agreements—including, for example, the right to collect and use the MAF. They must be awarded their attorneys’ fees as the prevailing party. *See, e.g., Borish v. Russell*, 155 Wn. App. 892, 907, 230 P.3d 646 (2010) (prevailing party entitled to fees pursuant to contractual provision whenever “the contract is central to the dispute”); *see also Crest*, 128 Wn. App. at 772 (when a contract provides for recovery of fees “RCW 4.84.330 mandates the award of fees to the prevailing party, with no discretion except as to the amount”).

²⁹ State Defendants are also entitled to an award of attorneys’ fees and costs for the reasons set forth in Master Builders Association of King and Snohomish Counties’ brief.

I. The Court Should Award State Defendants Fees on Appeal.

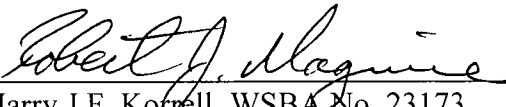
State Defendants respectfully request fees on appeal. *See* RAP 18.1. Both RCW 11.96A.150 and the enrollment agreements entitle State Defendants to their appellate fees. *In re Estate of Frank*, 146 Wn. App. 309, 327, 189 P.3d 834 (2008); *Mike's Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 71, 975 P.2d 532 (1999).

VI. CONCLUSION

This Court should affirm the trial court's: (a) entry of summary judgment dismissing Plaintiffs' marketing assistance fee claims; (b) exercise of its discretion in declining to award a monetary remedy; and (c) denial of Plaintiffs' attorneys' fees and costs. This Court should reverse the trial court's: (a) determination on summary judgment that retro participants are settlors of a trust governed by the enrollment agreements; (b) summary judgment determining that MSC's retention of interest is a breach of trust; (c) failure to apply the exculpatory provisions to Plaintiffs' claims; (d) failure in its judgment to distinguish between the respective State Defendants; and (e) failure to award attorneys' fees and costs to State Defendants.

RESPECTFULLY SUBMITTED this 27th day of December,
2011.

Davis Wright Tremaine LLP
Attorneys for Respondents/Cross-
Appellants BIAW, BIAW-MSA, WBBT,
and WBBT Trustees

By 
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COURT OF APPEALS
DIVISION II

11 DEC 29 AM 11:53

STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On December 27, 2011, I caused to be served in the manner noted below a copy of the document entitled **BRIEF OF RESPONDENTS/CROSS-APPELLANTS BIAW, BIAW-MSA, WBBT AND INDIVIDUAL WBBT TRUSTEES** via the means indicated below on the following:

(Via Hand Delivery)
Original and one copy
The Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101

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THIRD PARTIES

(Via U.S. First Class Mail)

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paytong@lanepowell.com

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Executed this 27th day of December, 2011, in Seattle, Washington.


Suzette Barber

FILED
COURT OF APPEALS
DIVISION II

11 DEC 29 AM 11:52

STATE OF WASHINGTON
BY DEPUTY

No. 41677-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In re Washington Builders Benefit Trust,
RE SOURCES FOR SUSTAINABLE COMMUNITIES, *et al.*,

Appellants,

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, *et al.*,

Respondents.

**APPENDICES TO BRIEF OF RESPONDENTS/CROSS-
APPELLANTS BIAW, BIAW-MSC, WBBT
AND INDIVIDUAL WBBT TRUSTEES**

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APPENDICES

1	March 4, 2011 Judgment (including Findings of Fact and Conclusions of Law) (CP 8115-8156)
2	March 4, 2011 Findings of Fact, Conclusions of Law and Order Denying All Motions for Awards of Attorney Fees and Costs (CP 8109-8114)
3	September 13, 2010 Order on Cross-Motions for Summary Judgment (including August 6, 2010 Letter Opinion) (CP 4996-5015)
4	1994 Declaration of Trust (Trial Exhibit 2027, CP 8904-8914) (emphasis added)
5	2007-08 ROII Enrollment Agreement (Trial Exhibit 2227, CP 8893-8902) (emphasis added)
6	Explanation of Flow of Funds (Exhibit 1 to September 15, 2009 Declaration of Sou Chiam) (CP 1599-1610)
7	Appendices A & B to the April 23, 2010 State Defendants' Motion for Judgment on Petitioners' Trust Claims Based on the ROII Enrollment Agreement (CP 1504-1513)
8	Interest Chart (excerpt from Trial Exhibit 1485)
9	RCW 11.96A.150 (emphasis added)
10	WAC 296-17B-200 (emphasis added)
11	WAC 296-17-90455 (emphasis in bold italics added)

CERTIFICATE OF SERVICE

11 DEC 29 AM 11:53

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On December 27, 2011, I caused to be served in the manner noted below a copy of the document entitled **APPENDICES TO BRIEF OF RESPONDENTS/CROSS-APPELLANTS BIAW, BIAW-MS, WBBT AND INDIVIDUAL WBBT TRUSTEES** via the means indicated below on the following:

(Via Hand Delivery)

Original and one copy

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 27th day of December, 2011, in Seattle, Washington.


Suzette Barber

Appendix 1:

March 4, 2011 Judgment (including Findings of Fact and
Conclusions of Law)

CP 8115-8156

42

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2011 MAR -4 AM 9:50

BETTY J. GOULD, CLERK

<input type="checkbox"/> EXPEDITE
<input type="checkbox"/> No hearing set
<input checked="" type="checkbox"/> Hearing is set
Date: <u>March 4, 2011</u>
Time: <u>9:00 a.m.</u>
Judge/Calendar: <u>Murphy</u>

SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

IN RE: WASHINGTON BUILDERS
BENEFIT TRUST,

No. 08-2-01674-6

RE SOURCES FOR SUSTAINABLE
COMMUNITIES, *et al.*,

JUDGMENT

Plaintiffs,

v.

BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON,
et al.,

Defendants.

Judgment Summary

This judgment does not provide for the payment of money.

JUDGMENT

It is hereby ORDERED, ADJUDGED AND DECREED that final
judgment is entered in accordance with the Court's December 17, 2010 Findings
and Conclusions attached hereto as Exhibit A, and the Court's Order on Cross-

JUDGMENT -- 1
DWT 16426326v4 0030722-000009

Davis Wright Tremaine LLP
LAW OFFICES
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Seattle, Washington 98101-3045
(206) 622-3150 • F

0-000008115

nlj

1 Motions for Summary Judgment, attached hereto as Exhibit B.

2 Each party shall bear its own fees, expenses and costs. All claims pending
3 in the captioned matter that are not otherwise addressed in this judgment shall be
4 and they hereby are dismissed with prejudice, and without costs or fees to any
5 party.
6

7 DATED this 4th day of March, 2011.

8
9
10 Carol Murphy
11 Hon. Carol Murphy

12 Presented by:

13
14 Matthew D. Clark
15 Harry J. F. Korrell, WSBA No. 23173
16 Robert J. Maguire, WSBA No. 29909
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JUDGMENT - 3

DWT 16426326v4 0030722-000009

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0-000008117

EXHIBIT A

0-00000

1 ☐ EXPEDITE
2 ☐ No hearing set
3 ☒ Hearing is set [to be ruled
upon without oral argument]
Date:

11/8/2010

Time: 9:00 a.m.

Judge/Calendar: Murphy

FILED

DEC 17 2010

THURSTON COUNTY CLERK

8 SUPERIOR COURT OF THE STATE OF WASHINGTON
9 THURSTON COUNTY

10 IN RE: WASHINGTON BUILDERS)
11 BENEFIT TRUST,)

No. 08-2-01674-6

12 RE SOURCES FOR SUSTAINABLE)
13 COMMUNITIES, *et al.*,)

FINDINGS AND CONCLUSIONS

14 Plaintiffs,)

15 v.)

16 BUILDING INDUSTRY)
17 ASSOCIATION OF WASHINGTON, *et*)
18 *al.*,)

19 Defendants.)
20
21
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27

FINDINGS & CONCLUSIONS

DWT 15726323v2 0030722-000009

0-000008119

1 This case was tried to this Court in a bench trial from September 13 to
2 September 22, 2010. The Court now makes the following findings:

3 **I. FINDINGS OF FACT**

4 1. The Building Industry Association of Washington is a not-for-profit
5 trade association. The Building Industry Association of Washington ("BIAW")
6 provides a range of services to its members. Its members include home builders
7 and related businesses in Washington State. There are 15 local associations
8 affiliated with BIAW who were previously named as defendants. The Court
9 granted summary judgment for the local associations on the claims asserted
10 against them.

11 2. BIAW sponsors one of the many retrospective rating
12 programs("retro programs") through which the Washington State Department of
13 Labor and Industries may rebate employers' industrial insurance premiums
14 pursuant to statutes in the State of Washington under RCW 51.18.

15 3. BIAW Member Services Corporation("BIAW-MS") is BIAW's
16 wholly-owned for-profit subsidiary. Washington Builders Benefit Trust
17 ("WBBT") is the trust related to BIAW's retro program, which it calls Return on
18 Industrial Insurance, or "ROI". The trust is managed by seven trustees appointed
19 by BIAW's president who selects the trustees from among BIAW's membership.
20 The individual Washington Builders Benefit Trust trustees are volunteers. They
21 are not compensated for their services as trustees.

22 4. Petitioners are five participants in BIAW's retro program and
23 beneficiaries under the Washington Builders Benefit Trust, although no longer
24 enrolled in the program. Each petitioner is or was also a member of BIAW and
25 one of BIAW's local associations.
26
27

1 5. Eight beneficiaries of the Washington Builders Benefit Trust entered
2 appearances and objected to the petition in this case. Beneficiaries of the trust
3 from 2003 through 2008 and other interested parties were served with a summons
4 and petition pursuant to the Trustees Accounting Act and the Trust and Estate
5 Dispute Resolution Act under RCW 11.96A. The form of the summons was
6 agreed to by the parties and approved by the Court.

7 6. Under Washington Administrative Code 296-17-90401, a retro
8 program is designed to reward employers participating in the program who are
9 able to keep their claims costs below the pre-selected level they have chosen.
10 Participating employers who are successful may be refunded a portion of the
11 premiums they paid to the Department of Labor and Industries.

12 7. Currently, approximately 6,000 mostly small employers participate
13 in the group retro program sponsored by BIAW. This program is generally
14 accurately described within trial Exhibit 2033, specifically on the ninth page.

15 8. The retro refund for all employer participants in the Return on
16 Industrial Insurance program is paid by the Department of Labor and Industries to
17 BIAW. Pursuant to Washington Administrative Code 296-17-90445, all retro
18 group refunds are paid directly to the sponsoring organization. It is the
19 responsibility of the sponsoring organization to distribute any refunds to the
20 group members.

21 9. The Department of Labor and Industries evaluates a retro group's
22 claims history over three years after the close of the plan year, with the goal of
23 retrospectively adjusting the premium paid by the group to the appropriate level.
24 The Department of Labor and Industries tenders a primary adjustment payment to
25 BIAW in May. These yearly payments were as much as \$50 million.

26 10. There may be disputes about claims or adjustments, and the
27 Department of Labor and Industries may increase the total adjustment amount or

1 make additional smaller payments to BIAW two to three times a year. These
2 smaller payments to BIAW have ranged from a few thousand dollars to
3 approximately half a million dollars.

4 11. The Department of Labor and Industries can also adjust the total
5 adjustment amount downward to resolve a dispute or to account for changes in its
6 estimate of the total refund. Up until the time of the third and final adjustment,
7 the Department of Labor and Industries may reduce or retract a previously
8 granted retro refund and/or issue a penalty.

9 12. BIAW and others created the original Washington Builders Benefit
10 Trust. The original WBBT operated under a document called the 1990
11 Declaration of Trust until 1994. The former WBBT and the transfer of its assets
12 to the current WBBT are not currently before the Court, and the Court addresses
13 no issues with regard to the former WBBT.

14 13. BIAW established WBBT to hold and invest ROII refunds between
15 the time Department of Labor and Industries pays any refunds to BIAW and the
16 distribution of refunds to employer participants. BIAW is the sponsor of the
17 ROII program through the Department of Labor and Industries. BIAW chose to
18 establish the trust as the method of holding the funds it received from the
19 Department of Labor and Industries. It could have chosen not to create a trust.
20 The choice was made after consideration of tax consequences and other impacts
21 to BIAW, its members, and the employer participants.

22 14. In 1993, the WBBT trustees chose to change their role in the ROII
23 program and divest themselves of day-to-day operations. In 1993, the WBBT
24 trustees and BIAW formed BIAW-MSC. The trustees and BIAW staff served as
25 the original BIAW-MSC board of directors. In 1993, the WBBT trustees drafted
26 a new declaration of trust that would govern the WBBT beginning in 1994. On
27 December 9, 1993, the WBBT trustees passed a resolution transferring all of the

1 assets held by WBBT to a new trust also called WBBT, to operate under the 1994
2 Declaration of Trust (Trial Exhibit 2027).

3 15. In July of each year, WBBT's policy is to distribute 70 percent of the
4 first adjustment received from the Department of Labor and Industries during
5 April or May. The following year, WBBT distributes an additional 20 percent of
6 the total of the first and second adjustments. Then in July of the following year,
7 after the third and final adjustment is received from or paid to the Department of
8 Labor and Industries, WBBT distributes the remaining amount, if any, to the
9 participants. The current structure of BIAW's retro plan, ROII, has been in place
10 and largely unchanged since 1994.

11 16. Under the program, the Department of Labor and Industries pays all
12 group refunds, if any, to the plan sponsor, BIAW. BIAW, as the plan sponsor, is
13 also directly responsible to the Department of Labor and Industries for any
14 shortfalls. Department of Labor and Industries pays group refunds relating to a
15 particular plan year over the course of three years.

16 17. The WBBT trustees work closely with a professional investment
17 adviser to invest the funds diligently and effectively. WBBT is governed by
18 written documents, including the 1994 Declaration of Trust and yearly enrollment
19 agreements. The Court has previously held that the employer beneficiaries, the
20 employer participants in ROII, are settlors of the WBBT. The Court has ruled
21 that the trustees are also bound by the 1994 Declaration of Trust because they
22 agreed to be so bound. The 1994 Declaration of Trust was signed only by
23 WBBT's trustees and was never distributed broadly to the employer participants.

24 18. The BIAW had a choice about how to structure its retro program. It
25 was not required to structure it as a trust, and, if it chose to form a trust, there was
26 no Department of Labor and Industries statute or regulation governing how the
27 trust must be structured. BIAW chose to use a trust and to allocate

1 responsibilities among BIAW, BIAW-MSA, and WBBT in this manner partially
2 to reduce taxes and liability.

3 19. In order to participate in BIAW's ROII program, each of the
4 approximately 6,000 employer participants must demonstrate their eligibility and
5 sign an enrollment agreement. A participant must enroll each year to continue to
6 participate in the next year of the program. The employer participants are
7 beneficiaries of the WBBT.

8 20. Although enrollment agreements may not have been identical since
9 1994, Exhibit 2227 was often utilized by the parties as the standard language in
10 the enrollment agreements signed by the employer participants.

11 21. Employer participants pay an enrollment fee to BIAW to enroll in
12 the ROII program. Additionally, the employer participants are informed in the
13 enrollment agreements that ten percent of the premium returned by the
14 Department of Labor and Industries is paid to BIAW as a marketing assistance
15 fee. Similarly, ten percent of the premium returned by the Department of Labor
16 and Industries is paid to the employer participant's local association.

17 22. The Court has previously ruled on petitioners' challenges to the
18 marketing assistance fee, and those issues are no longer before the Court.

19 23. WBBT trustees owe fiduciary duties to the trust beneficiaries, which
20 include petitioners.

21 24. Petitioners became beneficiaries of WBBT when funds were
22 received by BIAW from the Department of Labor and Industries, representing the
23 petitioners' share of the industrial insurance rebate pursuant to petitioners'
24 agreement to participate in the ROII program by signing an annual employer
25 participation agreement, or enrollment agreement.

26 25. The employer participation agreements were prepared by BIAW
27 staff and were not subject to modification by the employer participant prior to

1 signing. By signing the employer participation agreement, the employer
2 participant absolutely assigns to the trust all premium returns that may be payable
3 by the Department of Labor and Industries on behalf of the member and agrees
4 that the trust is vested with the sole authority to receive the premium return from
5 BIAW or the Department of Labor and Industries to hold some or all of such
6 premium return until the expiration of the period the Department of Labor and
7 Industries may adjust such premium return or claim penalties with respect to the
8 coverage period and distribute all premium returns to participants.

9 26. The enrollment agreement is the only trust document that shows the
10 intent of the employer participants. The enrollment agreement states that any
11 premium returns payable to BIAW by the Department of Labor and Industries
12 under the Department of Labor and Industries agreement shall be held in trust by
13 the trust for participants.

14 27. Pursuant to the enrollment agreement, BIAW is responsible for
15 administration of the ROII program but may delegate this responsibility to its
16 subsidiary.

17 28. WBBT has no staff and, instead, relies upon certain joint staff of the
18 BIAW and BIAW-MSC. There is no documentation of delegation of duties by
19 trustees to BIAW-MSC. There is no documentation of safeguards in that
20 relationship, such as requiring segregated accounts or billings for services
21 provided.

22 29. BIAW-MSC staff handles the trust funds, including depositing initial
23 adjustment checks received from the Department of Labor and Industries,
24 transferring the adjustment into WBBT investment accounts, withdrawing the
25 adjustments with earnings from WBBT investment accounts, calculating all
26 distributions and fee payments, and distributing the adjustments with earnings.

27

1 30. When BIAW-MSC was handling trust money by apparent authority
2 of the trustees, fiduciary duties attached to the handling of those trust funds.
3 BIAW-MSC and BIAW share offices and staff, including their executive vice-
4 president and accountant. The salaries and benefits of many staff members are
5 apportioned between BIAW and BIAW-MSC. It is unclear to what degree BIAW
6 and BIAW-MSC staff time and resources are devoted specifically to tasks on
7 behalf of WBBT.

8 31. Each member of the executive committee of BIAW-MSC also sits on
9 the executive committee of BIAW. Each board member of BIAW is also a board
10 member of BIAW-MSC. The local affiliates appoint members to BIAW and
11 BIAW-MSC boards. BIAW-MSC does not hold board meetings of its board of
12 directors or executive committee separate from BIAW board and executive
13 committee meetings. BIAW-MSC and BIAW have a consolidated budget. Not
14 all members of the BIAW board and/or executive committee were aware that they
15 also serve on the board and/or executive committee of BIAW-MSC.

16 32. Each year in late April or early May, the Department of Labor and
17 Industries issues a warrant to BIAW as sponsor of the ROII plan. When the
18 warrant arrives, the funds are deposited into a BIAW-MSC money market
19 account at South Sound Bank. South Sound Bank policies require that the funds
20 deposited in an account such as BIAW-MSC's money market accounts must
21 remain there for at least two business days before being transferred out. BIAW-
22 MSC endeavors to transfer the primary adjustments received from the
23 Department of Labor and Industries to WBBT's investment account at Wells
24 Fargo within a few days (in referencing Wells Fargo investment accounts, the
25 Court includes the predecessor investment accounts through AG Edwards and
26 Wachovia).

27

1 33. Because the funds received from the Department of Labor and
2 Industries are held in a money market account before being transferred to
3 WBBT's investment account, the money market account funds earn interest while
4 South Sound Bank holds them. The Court has already ruled that this interest,
5 called the "inbound interest," is a trust asset.
6

7 34. During the years 2004 to 2008, nearly \$200 million was transferred
8 from the Department of Labor and Industries to BIAW-MSA's money market
9 account and then to WBBT's investment account.

10 35. The inbound interest retained by BIAW-MSA was calculated by
11 accountant Todd Menenberg for each year between 2004 and 2008 in Trial
12 Exhibit 1485. On the amount transferred from the Department of Labor and
13 Industries to BIAW-MSA's money market account and then to WBBT's
14 investment account during these five years, BIAW-MSA earned a total of about
15 \$63,000 of inbound interest. For each employer participant for each year, the
16 amount is relatively small. The amount of the Department of Labor and
17 Industries funds plus the interest earned could have been transferred to the WBBT
18 investment account, but it was not.

19 36. WBBT invests the funds held in the investment accounts at Wells
20 Fargo. The trustees, in consultation with an investment adviser at Wells Fargo,
21 make decisions on where to invest the funds. Funds are held in WBBT's
22 investment account, invested for periods ranging from a few months to more than
23 two years.

24 37. The trustees made sound decisions regarding investments and
25 expenditures authorized by the trustees when trust funds were in Wells Fargo
26 investment accounts.
27

1 38. The funds held in WBBT investment accounts include the ten
2 percent marketing assistance fees that will be paid to BIAW and the local
3 associations.

4 39. In June of each year, the portion of the ten percent marketing
5 assistance fee that is to be paid to the local associations is transferred to BIAW-
6 MSC's money market account. The ten percent fee paid does not include any
7 interest or investment earnings.

8 40. In July of each year, the ten percent marketing assistance fee to be
9 paid to BIAW is transferred to the BIAW-MSC money market account from the
10 WBBT investment account. That ten percent fee does not include any interest or
11 investment earnings.

12 41. Also, in early July each year, the amounts that are to be paid to the
13 employer participants are transferred from the WBBT investment account to the
14 BIAW-MSC money market account at South Sound Bank. The funds transferred
15 from WBBT's investment account to BIAW-MSC in July are deposited in a
16 BIAW-MSC money market account that is linked to a checking account. BIAW-
17 MSC writes checks to the approximately 6,000 participants and then delivers
18 them to the local associations, which are responsible for delivering the checks to
19 the participants.

20 42. At distribution, net realized earnings on WBBT's investments from
21 the prior calendar year are paid to the participants receiving their third and final
22 adjustments. The net realized earnings distributed to all participants in the years
23 2004 through 2008 were between \$600,000 to over \$1 million per year.

24 43. The checks that BIAW-MSC sends to local associations come in
25 bundles of individual checks. The bundles include checks for employer
26 participants who have not renewed their membership that year and are not entitled
27 to the refund unless they renew.

1 44. Thus, some refund checks sent to local associations will never be
2 cashed by the employer participant. The forfeited refunds remain at South Sound
3 Bank. Local associations distribute checks to their member participants various
4 ways, including check distribution events and mailings.

5 45. The reasons for distributing checks through the local associations
6 were (1) to confirm membership and therefore eligibility to receive the check and
7 (2) for marketing purposes. There was testimony that BIAW staff were able to
8 confirm membership and mail checks directly to employer participants.

9 46. Typically, most participants cash their check within a matter of
10 weeks after BIAW-MSC writes the checks. BIAW-MSC earns and retains
11 interest on all these funds while they are in BIAW-MSC's money market account
12 between the time funds were transferred from the WBBT investment account and
13 the time the participant's check was presented.

14 47. The parties stipulated that BIAW-MSC retained all of this interest,
15 referred to as the "outbound" float interest. BIAW-MSC earned about \$361,000
16 interest on funds being distributed to all participants during the years 2004 to
17 2008.

18 48. Because the distribution system is not uniform, it is unknown what
19 amount of that interest is attributable to the employer participants' delaying
20 depositing their checks after the checks were in their dominion and control.
21 BIAW-MSC retained *this interest although it could have returned it to WBBT*.
22 This interest was not difficult to calculate or to return to the trust.

23 49. The accountant who testified at trial, Todd Menenberg, was able to
24 calculate the exact amount of interest earned and retained by MSC related to each
25 of the petitioners for each year from 2004 to 2008. The total for all five
26 petitioners together was \$300.92. This calculation could have been done for each
27

1 of the employer participants. Again, the amount of outbound interest related to
2 each employer participant for each year is relatively small.

3 50. None of the trustees and none of their companies profited
4 individually from their service as trustee. No decision by any trustee resulted in a
5 benefit to the trustees or their companies that did not also inure to the benefit of
6 all other ROII employer participants.

7 51. There was testimony regarding specific money market accounts as
8 well as testimony indicating that new money market accounts are opened each
9 year.

10 52. BIAW-MSC's money market accounts, which hold trust funds, also
11 contain BIAW-MSC's own funds. The Court has already determined that this
12 constitutes commingling and is a breach of trust. However, with minor
13 exceptions, the trust funds transferred to and from BIAW MSC's money market
14 accounts from 2004 through 2008 have been tracked through a recent accounting.

15 53. BIAW-MSC performs services for the trust, including administrative
16 support for meetings, calculation of refunds, processing refunds, responding to
17 inquiries, and administration of appeals for reconsideration of the application of
18 the trust's underwriting criteria for certain employer participants.

19 54. The value of the services that BIAW-MSC provides to WBBT is
20 unknown. Although the value is generally substantial, there has been no
21 presentation of contemporaneous records, forensic accounting, or other
22 documentation of the actual value of BIAW MSC's trust administration services.
23 It is not clear from the testimony and exhibits what services precisely are
24 provided solely for the enrollment fee.

25 55. The trustees did not understand that their trust duties applied,
26 whether or not trust funds were in the WBBT investment accounts. Although the
27 declaration of Trust provides that the trustees may employ and pay for the

1 services of others to assist them, BIAW-MSA has not billed WBBT for the
2 services it performs for the trust. Although there was testimony that retention of
3 interest by BIAW-MSA was a fair exchange for the services provided, there is no
4 documentation that the trustees ever authorized such payment nor a record of the
5 value of the services involved in the exchange.

6 56. Testimony on this subject was inconsistent, and the Court finds that
7 no formal decision by the trustees occurred regarding this exchange.

8 57. BIAW-MSA performed the administrative services for WBBT, and
9 BIAW-MSA performed those services efficiently and effectively.

10 58. BIAW-MSA made regular reports of activities on behalf of the trust
11 to the WBBT trustees at meetings and in telephonic conferences between
12 meetings, and the trustees received monthly reports of transactions involving the
13 funds held in WBBT's investment account from which they could monitor
14 activity on those accounts.

15 59. The Declaration of trust Section 12 requires an annual review of the
16 trust's books for account and records of all transactions. The trustees did not
17 meet this requirement.

18 60. RCW 11.106.020 requires that the trustee or trustees appointed by
19 any agreement shall mail or deliver at least annually to each adult income trust
20 beneficiary a written itemized statement of all current receivables and
21 disbursements made by the trustee of the funds of the trust, both principal and
22 income, and upon the request of any such beneficiary shall furnish the beneficiary
23 an itemized statement of all property then held by that trustee and may also file
24 any such statement in the Superior Court.

25 61. Prior to this action, WBBT had never provided beneficiaries with an
26 annual statement as required by RCW 11.106.020. Petitioners moved the Court
27 to order the trustees to file an accounting pursuant to RCW 11.106.030. The

1 Court granted petitioners' motion and ordered trustees to file an accounting. The
2 trustees filed an accounting on May 1st, 2009.

3 62. Pursuant to RCW 11.106.070, the Court is authorized to determine
4 the correctness of all action of the trustee or trustees set forth in the account and
5 shall render its decree either approving or disapproving the account or any parts
6 of it and surcharging the trustee or trustees for any losses caused by negligent or
7 willful breaches of trust.

8 63. The Court finds that the accounting provided before trial was
9 sufficient to satisfy the Court's order but only through 2008.

10 64. The trustees allowed BIAW-MSA to administer trust funds. The
11 trustees did not expressly delegate to BIAW-MSA trust duties but, rather,
12 acquiesced in this arrangement. It is not clear whether the trustees, BIAW staff,
13 or BIAW-MSA staff ever considered whether the trust was operating consistent
14 with the 1994 Declaration of Trust or the enrollment agreements.

15 65. The trustees did not closely supervise BIAW-MSA's administration
16 of the trust and did not enact safeguards to ensure that BIAW-MSA properly
17 administered the trust; however, the record contains no evidence establishing the
18 required standard of care regarding supervision of BIAW-MSA.

19 66. The petitioners have not proven that the precise level of supervision
20 over BIAW-MSA violated any specific duty. The level of supervision over
21 BIAW-MSA did not cause harm to the trust or its beneficiaries.

22 67. The bank account in which BIAW-MSA held trust funds at South
23 Sound Bank was insured for \$100,000 until 2009 and thereafter insured for
24 \$250,000. However, BIAW-MSA held as much as \$50 million in money market
25 accounts at South Sound Bank at that time. BIAW-MSA had sound reasons to
26 use the bank account at South Sound Bank, despite the inadequate insurance,
27

1 including that the account provided a competitive interest rate. The bank did not
2 fail.

3 68. Although individuals acting on behalf of the trustees at times failed
4 to follow required practices, such as two signatures for certain transactions and
5 signing over inaccurate titles, the actions were apparently all authorized, and no
6 harm resulted from these failures to follow required practices.

7 69. RCW 11.97.010 does not permit an exculpatory clause to relieve
8 trustees from accountability under RCW 11.106.030 and statutes following.
9 Those are the primary claims remaining in this suit. Nor can an exculpatory
10 clause permit the trustees to retain profit or excuse them from ultra vires acts.

11 II. CONCLUSIONS OF LAW

12 1. Under Washington law, trustee exculpatory and indemnification
13 provisions are valid and enforceable, but they are not effective to waive the
14 obligation that a trustee act with good faith and honest judgment. Both the
15 enrollment agreements and the Declaration of Trust that the Court has formerly
16 determined controlled the obligation of the trust and the trustees have broad
17 clauses releasing the defendants from liability for the kinds of claims asserted in
18 this case.

19 2. However, the waiver of liability clauses do not shield the defendants
20 from the remaining claims in this litigation, which are claims of failure to
21 exercise good faith or are claims of violations of statutory duties such as the duty
22 to perform an accounting. Those duties are not waivable.

23 3. The defendants violated their duties under the trust when they
24 retained interest from the period of time between when the Department of Labor
25 and Industries transferred funds to BIAW and before the funds were transferred to
26 the WBBT investment accounts. The defendants violated their duties under the
27

1 trust when they retained interest earned from the period of time between when
2 BIAW-MSD distributed the checks to member employees and when the member
3 employers deposited those checks. That includes all of the time that has been
4 considered outbound interest.

5 4. The defendants violated their duties under the trust when BIAW-
6 MSC commingled funds in its account or accounts.

7 5. The defendants violated their duties under the trust when they failed
8 to provide annual accountings.

9 6. The petitioners have not otherwise proven a breach of trust on their
10 remaining claims. *and they are dismissed with prejudice.*

11 7. Based upon those findings and conclusions, the court orders the
12 following remedies:

13 8. Petitioners have properly invoked the Court's equity jurisdiction
14 under RCW 11.96A and RCW 11.106, and the Court, therefore, has broad
15 discretion to fashion appropriate equitable relief. The petitioners have disclaimed
16 any right to money damages in this case and seek only equitable relief.

17 9. To the extent that petitioners seek payment of interest retained by
18 BIAW-MSD, that requested relief is denied. The Court finds that the damages to
19 each of the petitioners is not in significant amounts and that the trustees primarily
20 exercised sound discretion and maintained the trust on behalf of the beneficiaries.

21 10. The Court is also aware the petitioners represent only five out of
22 thousands of employer participants and that at least eight other employer
23 participants have implored the Court to deny any relief.

24 11. Accordingly, the BIAW, BIAW-MSD and the WBBT trustees are
25 ordered to modify their practices to be consistent with their obligations under the
26 law according to the Court's rulings and consistent with the documents created by
27

1 them in establishing the rights and duties under the trust, specifically, the
2 Declaration of Trust and the enrollment agreements.

3 12. The Court denies the petitioners' motion for an order to show cause
4 in 45 days after the judgment is entered concerning whether the defendants have
5 implemented the procedures to remedy the breaches of trust.

6 13. The matter of attorneys' fees in this case may be raised in an
7 appropriate motion.

8 DATED: 12/17/10

9 Carol Murphy
10 The Hon. Carol Murphy

11 Presented By:

12 By [Signature]

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BIAW-MS, WSET
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DAVIS WRIGHT TREMPER

EXHIBIT B

0-000

FILED
SUPERIOR COURT
THURSTON COUNTY WA

70 SEP 13 P5:12

BETTY J GOULD CLERK

BY _____ DEPUTY

<input type="checkbox"/> EXPEDITE
<input checked="" type="checkbox"/> No hearing set
<input type="checkbox"/> Hearing is set
Date: _____
Time: _____
Judge/Clerk: <u>Judge Carol Murphy</u>

SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

IN RE: WASHINGTON BUILDERS
BENEFIT TRUST

No. 08-2-01674-6

RE SOURCES FOR SUSTAINABLE
COMMUNITIES, ET AL.,

~~PROPOSED~~ ORDER ON
CROSS-MOTIONS FOR
SUMMARY JUDGMENT

Petitioners,

v.

BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON, et
al.,

Defendants.

This Order memorializes the Court's Letter Opinion of August 6, 2010 (the
"Letter Opinion"), which is attached hereto as Exhibit A.

This matter having come before the Court on the following motions:

1. State Defendants'¹ Motion for Judgment on the Petitioners' Trust
Claims Based on the ROII Enrollment Agreement;

¹ The State Defendants are Building Association of Washington (BIAW), BIAW-Member
Services Committee (BIAW-MSC), Washington Builders Benefit Trust (WBBT), and the
individually named WBBT trustees.

(PROPOSED) ORDER - 1
DWT 15298018v1 0030722-000009

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- 1 2. Washington Builders Benefit Trust and Trustees' Motion for
- 2 Judgment on Payment of Marketing Assistance Fees;
- 3
- 4 3. Motion for Judgment That Petitioners' Claims Are Barred By the
- 5 Statute of Limitations and Equitable Defenses;
- 6
- 7 4. BLAW, MSC, WBBT, and Trustees' Motion for Judgment on Interest
- 8 Issues;
- 9
- 10 5. Petitioners' First Motion for Partial Summary Judgment to Establish
- 11 Breach of Express Terms of Trust and Fiduciary Duties By
- 12 Commingling, Interest Skimming, and Failure to Supervise; and
- 13
- 14 6. Petitioners' Second Motion for Partial Summary Judgment to
- 15 Establish That 20% Payments Constitutes A Breach of Express Trust
- 16 and/or Breach of Loyalty;
- 17

18 The court has considered these motions and all the supporting materials, including
19 the declarations submitted and the attachments to those declarations (presented in
20 the several volumes of Defendants' Factual Record and Petitioners' Factual
21 Record), and all other papers, evidence, and argument submitted in favor or
22 opposition to the motions, as well as any other documents on file with the Court.

23 The court hereby ORDERS as follows:

24 I. State Defendants' Motion for Judgment on the Petitioners' Trust
25 Claims Based on the ROI Enrollment Agreement is GRANTED, for the reasons
26 set forth in the Letter Opinion;

27 II. Washington Builders Benefit Trust and Trustees' Motion for
Judgment on Payment of Marketing Assistance Fees is GRANTED, for the reasons

(PROPOSED) ORDER - 2
DWT 15298018v1 0030722-000009

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0-000008138

1 set forth in the Letter Opinion;

2 III. Motion for Judgment That Petitioners' Claims Are Barred By the
3 Statute of Limitations and Equitable Defenses is GRANTED in part and DENIED
4 in part as follows: it is DENIED, except that the Court grants the motion only to
5 limit the cause of action regarding the duty to provide an annual report to the years
6 2005 through 2007, for the reasons set forth in the Letter Opinion;
7

8 IV. BIAW, MSC, WBBT, and Trustees' Motion for Judgment on Interest
9 Issues is DENIED, for the reasons set forth in the Letter Opinion;
10

11 V. Petitioners' First Motion for Partial Summary Judgment to Establish
12 Breach of Express Terms of Trust and Fiduciary Duties By Commingling, Interest
13 Skimming, and Failure to Supervise is GRANTED IN PART and DENIED IN
14 PART, as follows: (1) Petitioners have established that the inbound float interest is
15 subject to the trust and their motion is granted on this issue; (2) Petitioners have
16 established that BIAW-MSC commingled trust funds in its general account, and
17 their motion is granted on the issue of breach of the duty not to commingle
18 (whether this commingling caused any damage is an issue properly reserved for
19 trial); this motion is otherwise denied, for the reasons set forth in the Letter
20 Opinion;
21

22 VI. Petitioners' Second Motion for Partial Summary Judgment to
23 Establish That 20% Payments Constitutes A Breach of Express Trust and/or
24
25
26
27

(PROPOSED) ORDER - 3
DWT 15298018v1 0030722-000009

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0-000008139

1 Breach of Loyalty is DENIED, for the reasons set forth in the Letter Opinion.

2 DATED: 9/13/10

3 Carol Murphy
4 The Hon. Carol Murphy

5 Presented By:

6 Davis Wright Tremaine LLP
7 Attorneys for Building Industry Association of Washington,
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(PROPOSED) ORDER - 4
DWT 15298018v1 0030722-000009

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(PROPOSED) ORDER - 5
DWT 15298018v1 0030722-000009

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0-000008141

Exhibit A

0-000

Superior Court of the State of Washington

For Thurston County



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Thomas McPhee, Judge
Department No. 2
Richard D. Hicks, Judge
Department No. 3
Christine A. Pomeroy, Judge
Department No. 4

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Department No. 5
Chris Wickham, Judge
Department No. 6
Anne Hirsch, Judge
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August 6, 2010

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LETTER OPINION

Re: *Re Sources for Sustainable Communities, et al. v. BIAW, et al.*
Thurston County Cause No. 08-2-01674-6

Dear Counsel:

This matter came before the court on June 25, 2010 for hearing on six motions for summary judgment. The parties to these summary judgment motions are the "State Defendants" and the Plaintiffs. The "State Defendants" consist of Building Association of Washington (BIAW), BIAW-Member Services Committee (BIAW-MSC), and the Washington Builders Benefit Trust (WBBT) and its trustees. The other defendants in this

lawsuit, known as the "Local Associations" were mostly dismissed by an earlier ruling and are not parties to these motions. The Plaintiffs are five Washington businesses that are employers and participate in the Building Industry Association of Washington's retrospective ratings program.

This court has considered the pleadings filed by the parties and the declarations and attachments associated with those pleadings. It also heard oral argument on June 25, 2010. In this letter opinion, the court makes rulings on each issue in the summary judgment motions.

Standard of Review

The standard summary judgment standards apply to these motions. The State Defendants also seek resolution on the merits under the Trust and Estate Dispute Resolution Act, ch. 11.96A RCW. TEDRA allows resolution of factual issues in this opinion. RCW 11.96A.100(10). This court declines to resolve all factual issues in this ruling, however, in favor of full resolution at trial as presented by the parties.

Statute of Limitations

The State Defendants argue that the statute of limitations bars this action because the plaintiffs reasonably should have discovered the alleged breach. This court denies summary judgment on this issue.

Under TEDRA:

An action against the trustee of an express trust for a breach of fiduciary duty must be brought within three years from the earlier of: (i) The time the alleged breach was discovered or reasonably should have been discovered; (ii) the discharge of a trustee from the trust as provided in RCW 11.98.041 or by agreement of the parties under RCW 11.96A.220; or (iii) the time of termination of the trust or the trustee's repudiation of the trust.

RCW 11.96A.070(1)(a). Here, the trustee has not been discharged and the trust has not terminated or been repudiated. Thus, the relevant question is whether, more than three years before filing this lawsuit, "the alleged breach was discovered or reasonably should have been discovered." *Id.*

The discovery rule does not require knowledge of the existence of a legal cause of action; instead, the statute of limitations begins to run when "the plaintiff knew or should have known all of the essential elements of the cause of action, *i.e.*, duty, breach, causation and damages." *Gevaart v. Metco Constr., Inc.*, 111 Wn.2d 499, 501-02 (1988). The application of the discovery rule is generally a question of fact. *Matson v. Weidenkopf*, 101 Wn. App. 472, 482 (2000).

Three alleged breaches are at issue to the statute of limitations defense. Those breaches relate to the marketing assistance fee, the interest earned on out-bound float and in-bound float, and the failure to provide annual reports.

1. *Marketing Assistance Fee*

The first issue here relates to the marketing assistance fee. Stated very generally, the Plaintiffs allege that the State Defendants violated the trust by deducting and giving to BIAW a ten percent "marketing assistance fee" when only a small portion of that fee was actually used for marketing and promotion of the plan and when, allegedly, the fee is far greater than fair consideration for BIAW and BIAW-MSC's services to the trust.

The State Defendants assert that the statute of limitations elapsed on this claim because the Plaintiffs should reasonably have discovered the breach. These defendants point to facts from BIAW publications, news media, the member agreements, and the beliefs of employers who are not plaintiffs in this litigation. If true, the State Defendants' evidence shows that it was well-publicized that BIAW earned money from the retrospective ratings program and it spent that money on political activity. This evidence may also show that the Plaintiffs, exercising due diligence, could have discovered over three years before filing this complaint that BIAW retained a ten percent member service fee and spent some of it on political activities. This is insufficient, however, to support summary judgment.

Due diligence is a factual issue unless the facts are so persuasive that they constitute proof as a matter of law. *See Matson v. Weidenkopf*, 101 Wn. App. at 482. The evidence here is not so persuasive. Some media reports and BIAW newsletter commentaries explained that the BIAW spent retrospective ratings program funds on political efforts, but it is a question of fact whether a person exercising due diligence would discover that this expenditure breached the trust. Summary judgment is denied on the issue of whether the statute of limitations bars the marketing assistance fee claim.

2. *Interest*

The second issue involves interest. The Plaintiffs allege that the State Defendants violated the trust by employing certain financing practices for "in-bound float" and "out-bound float." "In-bound float" occurred directly after the Department of Labor and Industries paid premium refunds to BIAW. The evidence showed that BIAW held the refunds in its interest-bearing account for two days, and on at least one occasion for five days, before transferring the funds to the trust fund, WBBT. BIAW kept the interest that accrued during these two days instead of transferring it to the trust.

"Out-bound float" occurred after BIAW-MSC issued checks to employers, including plaintiffs, from the trust fund. In the period between when BIAW-MSC wrote the checks and when the employers cashed the checks, BIAW-MSC retained the interest earned in its bank account on the funds.

The State Defendants assert that it is obvious that they retained the out-bound float. They argue that it was clear that no interest accrued on a payment between the time the check was cut and when it was cashed because the amount on the check remained the same. However, the evidence does not support the conclusion that it was obvious that the interest accruing during that time period was kept as profit or was rolled over into future payments or was retained or dispersed in some other manner. There was no accounting until this court ordered one and other evidence of obviousness is lacking. This court denies summary judgment to the State Defendants on this ground.

3. *Annual Statement*

The State Defendants also assert that the Plaintiffs cannot complain of the lack of an annual statement because they were put on notice of the breach when they did not receive such a statement during the many years in which they each participated in the plan.

RCW 11.106.020 requires the trustee to mail or deliver an annual statement to each adult income trust beneficiary at least once each year. The State Defendants did not do this, and one may fairly conclude that the plaintiffs were notified that this provision was breached when they did not receive an annual statement each year.

This does not warrant holding that the statute of limitations bars this issue in its entirety, however. RCW 11.106.020 mandates a duty that must be performed each year and therefore the State Defendants separately breached this duty each year in which they failed to provide an annual statement. Thus, the statute of limitations bars this cause of action only for three years prior to filing the lawsuit.

This court previously limited the lawsuit to events occurring on or after September 27, 2003. The complaint was filed on July 16, 2008. Given the three year statute of limitations and the annual report requirement, as a matter of law the Plaintiffs knew, or should have known, on December 31, 2004, that no 2004 annual report would be forthcoming in that year or prior years. The next three years fall within the three-year statute of limitations and an action for failure to provide an annual report can be maintained for 2005, 2006, and 2007.

Accordingly, this court denies summary judgment on the statute of limitations except to the extent that this court limits the cause of action regarding the duty to provide an annual report to the years 2005 through 2007.

Equitable Defenses

The State Defendants next assert that equity bars this lawsuit. They argue that the plaintiffs knew about the actions subject to this lawsuit and acquiesced to it by continuing to be members of the plan. However, as discussed above, it is not clear whether the plaintiffs knew of any alleged breaches of trust. Instead, the State Defendants merely

show that the Plaintiffs did not agree with the BIAW's political activities but they continued to participate in the plan. Summary judgment on this basis is denied.

Governing Trust Instrument

A hotly debated issue in this case involves which instrument governs the trust. In 1994, BIAW created the Washington Benefit Builders Trust by a document commonly known in this litigation as the "1994 Declaration of Trust." The State Defendants argue that this is the trust document. The Plaintiffs never signed or saw this document and argue that the enrollment agreements that they signed are the governing trust document. This court holds that both documents govern the trust.

The State Defendants first attempt to argue, unpersuasively, that the enrollment agreements could not form trusts. They assert that the enrollment agreement must be only a contract or a trust, but cannot be both. They cite foreign case law and one Washington case that does not stand for this proposition. The Washington case cited, *Grandy v. Luther*, actually held that "if the necessary elements are present, a writing may create two sets of obligations, such as a contract and a trust." 12 Wn. App. 542, 545 (1975). The only disputed element of a trust in this case is the identity of the settlor, and this court may resolve that element as a matter of law.

The primary issue in dispute here is which parties are the settlors, because resolution of that issue will determine whether the enrollment agreement is the trust instrument. A "trust instrument" is a document in which the settlor transfers equitable title in property to the trust beneficiary and transfers a property interest to the trustee. BOGERT, GEORGE G., ET AL., BOGERT'S TRUSTS AND TRUSTEES § 147. A "settlor" (i.e., trustor) is the person who has legal competence to make a disposition of the legal title to the property, such as the property's owner. RESTATEMENT (SECOND) OF TRUSTS § 3; 76 AM. JUR. 2D TRUSTS § 49. The settlor can also be a beneficiary of the trust. RESTATEMENT (SECOND) OF TRUSTS § 114. "If a beneficiary transfers part of the property or supplies part of the consideration to fund a trust, the beneficiary is ordinarily settlor to the extent of a fractional portion appropriate to reflect his or her proportionate share of the funding." RESTATEMENT (THIRD) OF TRUSTS § 58, CMT. F.

Here, the 1994 Declaration of Trust was drafted and signed by BIAW in order to create the WBBT. The Declaration of Trust was not signed by employers who participate in BIAW's industrial insurance premium return program (ROI) fund. However, no ongoing trust could exist without the enrollment agreements because assets would not be deposited into the trust. The 1994 Declaration of Trust was never disclosed to employers and is not incorporated into any document that the participating employers saw. The enrollment agreements are drafted by BIAW and signed by employers who participate in the ROI program, but they are not formally acknowledged or agreed to by BIAW's Board.

The parties dispute the identity of the settlor based on the structure of BIAW's ROII program. The State Defendants argue that they own the premium refunds because the Department of Labor and Industries pays the refunds directly to BIAW and does not oversee the refunds' distribution to employers. The plaintiffs argue, on the other hand, that they own the refund and the State Defendants are merely a conduit for the funds. The plaintiffs are correct; they own the refunds subject to the conditions the parties agreed to in the enrollment agreements.

Washington law provides for refunds of industrial insurance premiums in certain circumstances to groups of employers through their chosen sponsoring organization. The purpose of the law is to provide incentives to employers to increase workplace safety. Refunds are based on the participating employers' workers' compensation records. Although the Department of Labor and Industries does not regulate the distribution of refunds to employers, it states that "[i]t is the responsibility of the sponsoring organization to distribute any refund to the group members." WAC 296-17-90445. Under this regulatory scheme, it appears that the regulation contemplates that employers own the refunds.

The parties also understood that the employers owned the premium refund, subject to deductions and conditions agreed to in the enrollment agreements. The 1994 Declaration of Trust established the WBBT "on behalf of Employer Participants" and it makes no claim that the State Defendants own the funds outright. The member enrollment agreement, also written by BIAW, states that "[b]y execution of this Agreement, the Member absolutely assigns to the Trust all Premium Returns that may be payable to DLI on behalf of the Member" This clause expresses an understanding by all parties that the refunds belong to the employers and are held in trust by the sponsoring organization until they are distributed. Under both the L&I regulations and the parties' understanding, the employers own these refunds, subject to the enrollment agreements, and therefore, the employers are the settlors. As such, the enrollment agreements are trust instruments. See BOGERT, GEORGE G., ET AL., BOGERT'S TRUSTS AND TRUSTEES § 147 (trust instruments are documents in which settlor transfers assets into trust).

This court further holds that the 1994 Declaration of Trust is a valid trust instrument. The State Defendants concede this point. They assert that the 1994 Declaration of Trust was incorporated into the enrollment agreements and that they abided by its terms. Under equitable principles, the State Defendants bound themselves to this document's terms. Accordingly, this court holds that both the enrollment agreements and the 1994 Declaration of Trust are valid trust instruments.

Marketing Assistance Fee

The parties also present cross motions for summary judgment regarding the marketing assistance fee. To resolve this issue, the court must answer three questions. First, did payment of a flat ten percent fee to BIAW and a flat ten percent fee to Local

Associations violate the trust instruments? Second, were the trustees of WBBT required to use BIAW's fee for only marketing and assistance of the plan or to oversee that it was used in this manner? Third, did the State Defendants violate the trust by paying the marketing assistance fees in three annual installments? This court will address each question in turn.

1. *Payment of Flat Fees*

This court must resolve whether payment of flat ten percent fees violated the trust instruments. It did not.

This court determines the settlor's "intent in a trust document by construing the document as a whole." *Bartlett v. Betlach*, 136 Wn. App. 8, 19 (2006). "Where the meaning of an instrument evidencing a trust is unambiguous, the instrument is not one requiring judicial construction or interpretation." *Templeton v. Peoples Nat'l Bank of Wash.*, 106 Wn.2d 304, 309 (1986). "A trust is ambiguous if it is susceptible of more than one meaning; ambiguity is a question of law." *Waits v. Hamlin*, 55 Wn. App. 193, 200 (1989). Further, "if the intention may be gathered from [the trust] language without reference to rules of construction, there is no occasion to use such rules, and the actual intent may not be changed by construction." *Templeton*, 106 Wn.2d at 309. Accordingly, extrinsic evidence should not be considered where "intent can be derived solely from the four corners of the trust document." *Id.*

Whether a trust instrument is ambiguous is a question of law. *Waits v. Hamlin*, 55 Wn. App. 193, 200, *review denied*, 113 Wn.2d 1025 (1989). If the trust instrument is ambiguous, however, extrinsic evidence is admissible to show the settlor's intent when executing the document and the issue becomes factual. *In re Estate of Curry*, 98 Wn. App. 107, 113 (1999).

The 1994 Declaration of Trust contains two relevant sections:

Section 10. The trustees shall pay or provide for the payment of the Funds of all reasonable and necessary expenses of BIAW or any other entity in administering the retrospective rating program on behalf of Employer Participants.

Section 11. Before distribution of the balance of each Fund left after payment of all expenses and final Adjustments by DLI, the Trustees shall to [sic] pay to BIAW a marketing assistance fee of 10% of all Employer Participants' distributive shares of the Fund. In addition, the Trustees shall pay to any local associations with members who are Employer Participants in a Plan a marketing assistance fee of 10% of the distributive share of the Fund allocated to Employer Participants who are members of such local association.

Section 11 of this document plainly allows a ten percent flat fee to BIAW and a ten percent flat fee to local associations. The plaintiffs assert that the term "marketing assistance fee" is a contingent clause and, therefore, the ten percent fees to BIAW and locals are acceptable only if they are used for "marketing assistance." The plaintiffs provide evidence that those fees primarily generated profit and the actual marketing of the plan required a very small percentage of this money.

However, this interpretation is inconsistent with Section 10 and the opening clause of section 11. Section 10 provides a separate authorization to pay all reasonable and necessary expenses to administer the retro plan. And section 11 provides that the "marketing assistance fee" is deducted after paying all expenses. The marketing assistance fees are plainly flat fees under the Declaration of Trust. The duty to pay these fees are not contingent on any event or expenses.

The parties also dispute the meaning of the fees within the enrollment agreements. The relevant portion of the agreement reads:

By execution of this Agreement, the Member absolutely assigns to the Trust all Premium Returns that may be payable by DLI on behalf of the Member, to protect the Member and the BIAW from Penalties and from other future obligations to DLI with respect to Industrial Insurance for the Coverage Period and any other period. The Member further authorizes the Trustee to pay from the Premium Returns the balance of the Enrollment Fee and such *costs and expenses* for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer ten percent (10%) of the Participants' Premium Returns applicable to the Coverage Period to local associations and 10% to BIAW *for marketing and promotion of the Plan*.

MEMBER AGREEMENT, AT RECITAL (A)(4)(B) (emphases added).

The Plaintiffs argue that the term "for marketing and promotion of the Plan" creates a duty to deduct these fees only if needed to market and promote the plan and that duty was not fulfilled because a small percentage of the fees were used in this manner. The plain language of the agreements provides otherwise. Unlike the fee for costs and expenses, in which BIAW is to deduct the exact cost of the expenses, the marketing fees total 20 percent of the premium return, regardless of the actual expense. The agreement does not state, for instance, that "up to ten percent" may be deducted. Payment of a flat fee is required.

Under the plain language of the Declaration of Trust and the enrollment agreements, the marketing assistance fee is a flat fee that is not contingent on its use. It is best construed as consideration. Courts do not generally inquire into the adequacy of consideration, *Browning v. Johnson*, 70 Wash.2d 145, 147 (1967). The Plaintiffs have not persuaded this court that doing so is a proper exercise of equitable power under these

circumstances, when they knowingly entered into enrollment agreements that clearly provide for flat fees of ten percent each to BIAW and the Local Associations. Accordingly, this court rules that the State Defendants were required to pay ten percent of the premium returns to BIAW and ten percent to the Local Associations.

2. Use of Fees

The question remains, however, whether the Defendants' fees may be deducted and returned by the Defendants if the expense of marketing and promotion is less than the fee generates or whether the Defendants have a duty to ensure that the fees are used solely for marketing and promotion.

The State Defendants do not argue that the ten percent fees were wholly used solely for marketing and promotion of the plan. The Plaintiffs, in contrast, provide evidence that only a small percentage was used for these purposes, by their calculation. However, there is no evidence that this flat fee must be used for a specific purpose, such as advertising the plan or printing promotional materials. More importantly, the term "marketing and promotion of the plan" may be construed very broadly to encompass many activities. The Plaintiffs do not present authority for the proposition that BIAW must monitor the way these fees are used. For these reasons, this court holds that the State Defendants are not liable for breach of trust for improperly expending the marketing assistance fees.

3. Timing of Payment

A narrow issue also remains regarding when these fees were paid. The Declaration of Trust provides that the fee will be paid "[b]efore distribution of the balance of each Fund left after payment of all expenses and final Adjustments by DLI." It is undisputed that the fee was paid in three annual installments, just as the premium refunds are paid, and after certain adjustments common-sense reading of the above language shows that this timing of payments was not improper. Summary judgment is granted to the State Defendants on this issue.

Interest, Commingling, Failure to Earmark, and Failure to Supervise

The next set of issues relates to interest, commingling, failure to earmark, and failure to supervise. The State Defendants move for summary judgment regarding in-bound float, out-bound float, and waiver of interest issues. The plaintiffs move for summary judgment regarding in-bound float, out-bound float, commingling and failure to earmark trust funds, and failure to supervise BIAW-MSC.

1. Facts

The parties appear to agree on the following facts, unless indicated otherwise. The Department of Labor and Industries pays premium refunds to BIAW in three

installments for each year. BIAW deposits these refund checks directly into MSC's bank account. BIAW-MSC keeps other funds in that account and does not set it aside in a sub-account or otherwise designate it as trust funds at this time. The State Defendants assert that they could always trace the funds while they were in BIAW-MSC's account.

BIAW-MSC must keep the premium refunds in its bank account for at least two days to comply with bank policy. Other banking structures were possible, but the State Defendants chose this one. BIAW-MSC kept the refunds in this account for at least two days and concedes that it did not always transfer the funds as soon as possible to WBBT.

Primary payments, the first of the three installments, were transferred after two days with the exception of one mistake in which the primary payment was transferred after five days. Interim payments were not transferred two days after deposit. The State Defendants explain that "because they are much smaller, it did not occur to MSC's accountant that it was as urgent to transfer them to WBBT as quickly."¹ And BIAW-MSC followed a different practice if an appeal was pending to dispute the refund. In cases of appeals, BIAW-MSC's accountant would "sometimes wait to see whether those appeals will yield additional payments so that the interim payments can be transferred together."²

Regardless of whether BIAW-MSC transferred the funds as soon as possible under the bank's policy, it kept all the interest. In 2006, BIAW-MSC kept \$14,424 in interest on the primary adjustment, \$155 on the first interim adjustment, and \$1,695 on the second interim adjustment.

After the two or more days elapse, BIAW-MSC transfers the funds to WBBT. WBBT only holds the funds, it does not administer them. When it is time to distribute the trust funds to member employers, WBBT transfers the funds to BIAW-MSC and BIAW-MSC cuts the checks to the member employers.³ During the time in between when BIAW-MSC cuts the checks and when they are cashed, BIAW-MSC keeps the accrued interest instead. This is called "out-bound float interest."

2. In-Bound Float Interest

Both parties seek summary judgment on the issue of in-bound float interest. This court holds that this interest belongs to the trust and the State Defendants breached the trust by retaining it.

"All increase in the value of a trust fund derived from investment or reinvestment returns or from interest earned on the fund, belongs to, and becomes a part of, the corpus

¹ Defendant's Motion for Judgment on Interest Issues, at 5.

² *Id.*

³ There is some evidence that it would be onerous to require WBBT to cut checks because it would have to be done by the bank itself, which may refuse to do so and would certainly charge a fee for this service.

of the trust estate in the absence of some specification to the contrary in the instrument or the statute creating the trust." *Lynn v. City of Longview*, 15 Wn.2d 528, 533 (1942).

The State Defendants assert that the premium refunds are not subject to the trust until they are transferred to WBBT. Until that happens, they argue, the beneficiaries have no property interest in the funds and the State Defendants may do as they wish, taking fees and interest from the premium refunds with impunity. They cite RCW 11.104A.070, which reads, in relevant part:

(a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life[.]

Neither the 1994 Declaration of Trust nor the enrollment agreements specify a date in which income interest begins. The State Defendants argue that these funds are not subject to the trust until they are "transferred to a trust" by literally transferring the money to WBBT's account.

As previously resolved, however, the employers are the settlors and own the premium refunds at all times after the refunds are issued, subject to the terms of the enrollment agreement. The refund is transferred to a trust according to the terms of the enrollment agreement once BIAW receives the refund. It is irrelevant when the funds are transferred to the WBBT account. Moreover, BIAW could have developed a banking system that would allow it to immediately deposit the funds in the WBBT account or to account for interest and pay that interest into the trust account. Its failure to do so should not result in a financial benefit to the State Defendants. This court holds that the in-bound float interest is subject to the trust. The Plaintiffs' summary judgment motion is granted on this issue.

3. *Out-Bound Float Interest*

Both parties also seek summary judgment regarding out-bound float interest. This court denies summary judgment on this issue because there remain questions of fact as to whether interest was retained as trust funds or as profit and the amounts retained.

Additionally, it is unclear how much, if any, retained out-bound float interest was retained after the checks were within the dominion and control of employers. Once the employers received the payments, it was solely their discretion when to deposit them into their accounts. Summary judgment is denied on the issue of out-bound float interest.

4. *Waiver of Liability*

The final issue in the State Defendants' motion is waiver. This court denies summary judgment on this ground.

A settlor may relieve the trustees of statutory trust duties by express provision. RCW 11.97.010. However, "[i]n no event may a trustee be relieved of the duty to act in good faith and with honest judgment." RCW 11.97.010. Here, the Declaration of Trust states:

The Trustees shall not be liable for any mistake or error of judgment in the administration of the Trust, except for willful misconduct, so long as they continue to exercise their duties and powers in a fiduciary capacity primarily in the interests of BIAW, the local associations, and the Employer Participants.

Art. IV, § 17. And the enrollment agreement states:

The Member hereby releases and agrees to indemnify and hold BIAW, its subsidiary, the Trust, and all the members of the Trust harmless from any and all liability for any decision which may now or hereafter b[e] made by BIAW, its subsidiary, or the Trust with regard to the Plan, any Premium Returns (including interest, principal and profit), the payment of any such sums or the investment of such sums.

Article B-10.

The State Defendants argue that these agreements abrogate their duties under the trust. However, the ultimate issue for each alleged breach of fiduciary duty is whether the defendants exercised good faith and honest judgment. These duties cannot be abrogated by agreement. RCW 11.97.010. This court denies summary judgment on this issue.

5. *Commingling and Failure to Earmark*

The Plaintiffs move for summary judgment for commingling the trust funds in BIAW-MSC's general account. Commingling of personal funds with trust funds may constitute self-dealing that violates the duty of loyalty to beneficiaries. *In re Marriage of Petrie*, 105 Wn. App. 268, 276 (2001). The State Defendants concede that they commingled the funds.⁴ Based on the State Defendants' concession, the Plaintiffs'

⁴ OPPOSITION TO PLAINTIFFS' FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING INTEREST ISSUES, AT 12-13 ("When retro refunds are transmitted from DLI to MSC and then to WBBT, or distributions are transmitted from WBBT to BIAW-MSC and then to the participants and local associations, they temporarily rest in accounts at BIAW-MSC. These accounts also contain other funds of BIAW-MSC.")

motion is granted on the issue of breach of duty only. The State Defendants argue that this breach did not cause damages, but they do not bring a cross motion for summary judgment on this issue and therefore damages from this breach is an issue properly reserved for trial.

The State Defendants correctly assert that they could have been paid for administrative costs associated with running the BIAW ROII program. The BIAW has chosen not to bill for or be paid for its administrative costs. However, the State defendants cannot use the unpaid administrative costs to claim that improper interest payments or commingling of funds are simply 'a wash.' This argument fails as a matter of law. The question is whether a particular breach of fiduciary duties occurred and proximately caused damage. The present question is not, as the State Defendants assert, whether the Plaintiffs ultimately benefited from BIAW's actions.

6. Failure to Supervise

The parties agree that BIAW designated BIAW-MSA as an agent of the trust and tasked BIAW-MSA with administering it. The Plaintiffs seek a ruling on summary judgment that BIAW failed to adequately supervise BIAW-MSA. This court denies this motion.

A trustee has the right to designate agents to administer the trust. RCW 11.98.070(27). The trustee must select and retain the agent with "reasonable care." RCW 11.98.070(27)(c). Further, the trustee may breach the trust if it does not exercise adequate supervision over the agent's conduct. RESTATEMENT (SECOND) TRUSTS § 225. The 1994 Declaration of Trust also requires the trustees to "act prudently in the delegation or allocation of responsibilities to other persons" and to "exercise reasonable care to prevent any other fiduciary from committing a breach of the fiduciary's obligations and responsibilities." 1994 DECL. OF TRUST, ART. IV, § 20.

The State Defendants argue that it was solely their discretion to delegate trust duties to another entity. However, this argument relates to the decision about to whom it could properly delegate, while the Plaintiffs complain that there was failure to supervise a properly-delegated entity.

The parties dispute the facts. The Plaintiffs argue that WBBT's trustees exercised almost no oversight of BIAW-MSA. The State Defendants alternatively argue that the trustees were aware of the manner in which BIAW-MSA processes payments and retained interest.

The Plaintiffs provide no evidence that the alleged failure to supervise caused any damages. Nor do they argue that, if BIAW had better supervised BIAW-MSD, then the alleged breaches would not have occurred. There is no evidence supporting damages. For this reason, this court denies summary judgment on this issue.

The court will sign findings of fact and conclusions of law consistent with this ruling upon presentation.

Sincerely,

Carol Murphy

Carol Murphy
Superior Court Judge

cc: Court Clerk

Appendix 2:

March 4, 2011 Findings of Fact, Conclusions of Law and
Order Denying All Motions for Awards of Attorney Fees
and Costs

CP 8109-8114

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FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2011 MAR -4 AM 9:50

BETTY J. GOULD, CLERK

1 ☐ EXPEDITE
2 ☐ No hearing set
3 ☒ Hearing is set
4 Date: March 4, 2011
5 Time: 9:00 a.m
6 Judge/Calendar: Carol Murphy

7 SUPERIOR COURT OF THE STATE OF WASHINGTON
8 THURSTON COUNTY

9 IN RE: WASHINGTON BUILDERS)
10 BENEFIT TRUST,)

No. 08-2-01674-6

11 RE SOURCES FOR SUSTAINABLE)
12 COMMUNITIES, *et al.*,)

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER DENYING ALL
MOTIONS FOR AWARDS OF
ATTORNEY FEES AND COSTS

13 Plaintiffs,)

14 v.)

15 BUILDING INDUSTRY)
16 ASSOCIATION OF WASHINGTON,)
17 *et al.*,)

18 Defendants.)

19 This case was resolved on the merits in prior proceedings, including several
20 motions for summary judgment and then a bench trial on the remaining claims.
21 The question of who should be responsible for the attorney fees and costs
22 incurred in the course of this litigation is now before the Court on motions filed
23 by Petitioners, by Defendants BIAW, BIAW Member Services Corporation,
24 Washington Builders Benefit Trust ("WBBT"), and WBBT's trustees, and by
25 defendant Master Builders Association of King and Snohomish Counties.
26
27

FINDINGS, CONCLUSIONS, AND ORDER ON
MOTIONS FOR ATTORNEY FEES AND COSTS - 1
DWT 16604809v2 0030722-000009

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0-000008109

1 The Court has considered all the briefs and supporting material filed by the
2 parties and heard the arguments of counsel on February 11, 2011.

3 For the reasons stated below, this Court denies all the motions and orders
4 that each party shall be responsible for its own attorney fees and costs.

5 **I. FINDINGS OF FACT**

6 1. The Court is extremely familiar with the disputes of the parties in
7 this case, having heard testimony, having heard argument, having reviewed the
8 pleadings, and in fact having decided the matters that proceeded to trial, as well
9 as deciding the vast majority of the pretrial matters in this case.

10 2. This case is a unique case even within the context of cases brought
11 under the Trust and Estate Dispute Resolution Act ("TEDRA"), RCW 11.96A,
12 which are in and of themselves unique cases. The conclusion of this case is
13 unique as well.

14 3. The major basis for fees in the motions brought by the parties today
15 is the TEDRA statute. An alternative basis has been cited to and that is paragraph
16 nine of the enrollment agreement.

17 4. The Court finds that the enrollment agreement does not provide a
18 basis for fees in this case. However, even if it does apply to the facts of this case,
19 under a prevailing party analysis, the Court does not find that it is clear in this
20 case which party would be entitled to those fees given the result in this case.

21 5. Petitioners prevailed in some of their claims in this case. There is
22 also no question that many claims were made by the Petitioners were not
23 successful, and Defendants prevailed on those claims.

24 6. Petitioners were awarded no damages or other financial recovery in
25 this case. Petitioners did obtain injunctive relief at the end of this trial, but there
26 were many, many issues in this case in which the Petitioners did not prevail.
27

1 7. There is no indication that Petitioners were insincere in their efforts
2 to benefit the entire trust, whether other beneficiaries agreed with them or not.

3 8. The Court agrees that the claims made, even those in which the
4 Petitioners did not prevail, were not frivolous.

5 9. Both Petitioners and Defendants have asserted throughout this
6 litigation and today that the other has caused this litigation to be more lengthy and
7 costly. This Court finds that it would not be particularly fruitful to attempt to sort
8 out these claims that have been present throughout this litigation.

9 II. CONCLUSIONS OF LAW

10 1. As noted above, the major basis for fees in the motions brought by
11 the parties today is the TEDRA statute. Defendants also seek fees under
12 paragraph nine of the enrollment agreement.

13 2. The Court finds that the enrollment agreement does not provide a
14 basis for fees in this case and that, even if the agreement provided a basis for fees
15 in this case, it is not clear which party is the substantially prevailing party given
16 the result in this case.

17 3. This Court finds that the issue of attorneys' fees under TEDRA is
18 one of the Court's discretion and is not mandatory. The wording in the TEDRA
19 statute is "may." RCW 11.96A.150(1) provides:

20 (1) Either the superior court or any court on an appeal may, in
21 its discretion, order costs, including reasonable attorneys' fees,
22 to be awarded to any party: (a) From any party to the
23 proceedings; (b) from the assets of the estate or trust involved
24 in the proceedings; or (c) from any nonprobate asset that is the
25 subject of the proceedings. The court may order the costs,
26 including reasonable attorneys' fees, to be paid in such amount
27 and in such manner as the court determines to be equitable. In
exercising its discretion under this section, the court may
consider any and all factors that it deems to be relevant and

1 appropriate, which factors may but need not include whether
2 the litigation benefits the estate or trust involved.

3 4. The parties have cited to numerous TEDRA cases in support of their
4 respective positions.

5 5. As the Court has indicated previously in this litigation, this case is a
6 very unique case even within the context of TEDRA cases, which are in and of
7 themselves unique cases. The conclusion of this case is unique as well.

8 6. So although the Court has reviewed the authority cited by the parties,
9 none of those cases are exactly what we have here.

10 7. The parties throughout this litigation have attempted in looking at
11 those authorities to try and find some basis for their positions in various motions
12 before this Court, and I appreciate those efforts. I know it has been difficult
13 because of the uniqueness of this particular case.

14 8. The Court agrees that a lack of financial recovery is not a bar to the
15 receipt of attorneys' fees and costs.

16 9. The Court also agrees that the claims made, even those in which the
17 Petitioners did not prevail, were not frivolous.

18 10. As noted above, the Court is extremely familiar with the facts of this
19 case and the progress of the litigation. The Court is in a position at this time to
20 make a determination based upon the Court's equitable powers.

21 11. Based upon the Court's review of this entire case, the authorities that
22 have been provided, and the Court's discretionary authority to award fees in this
23 matter, the Court finds that the proper equitable decision here is to require that the
24 parties bear their own costs and fees.

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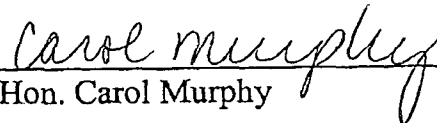
III. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. All motions for an award of attorney fees, expenses and costs are denied.

2. Each party shall bear its own fees, expenses and costs incurred in the captioned action.

DATED: this 4th day of March, 2011


Hon. Carol Murphy

Presented By:

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Appendix 3:

September 13, 2010 Order on Cross-Motions for
Summary Judgment (including August 6, 2010 Letter
Opinion)

CP 4996-5015

FILED
SUPERIOR COURT
THURSTON COUNTY WA

'10 SEP 13 P5:12

BETTY J GOULD CLERK

BY _____ DEPUTY

☐ EXPEDITE
☒ No hearing set
☐ Hearing is set
Date: _____
Time: _____
Judge/Calendar: Judge Carol Murphy

SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

IN RE: WASHINGTON BUILDERS
BENEFIT TRUST

No. 08-2-01674-6

RE SOURCES FOR SUSTAINABLE
COMMUNITIES, *ET AL.*,

~~PROPOSED~~ ORDER ON
CROSS-MOTIONS FOR
SUMMARY JUDGMENT

Petitioners,

v.

BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON, et
al.,

Defendants.

This Order memorializes the Court's Letter Opinion of August 6, 2010 (the
"Letter Opinion"), which is attached hereto as Exhibit A.

This matter having come before the Court on the following motions:

1. State Defendants'¹ Motion for Judgment on the Petitioners' Trust
Claims Based on the ROII Enrollment Agreement;

¹ The State Defendants are Building Association of Washington (BIAW), BIAW-Member
Services Committee (BIAW-MSC), Washington Builders Benefit Trust (WBBT), and the
individually named WBBT trustees.

2. Washington Builders Benefit Trust and Trustees' Motion for Judgment on Payment of Marketing Assistance Fees;
3. Motion for Judgment That Petitioners' Claims Are Barred By the Statute of Limitations and Equitable Defenses;
4. BIAW, MSC, WBBT, and Trustees' Motion for Judgment on Interest Issues;
5. Petitioners' First Motion for Partial Summary Judgment to Establish Breach of Express Terms of Trust and Fiduciary Duties By Commingling, Interest Skimming, and Failure to Supervise; and
6. Petitioners' Second Motion for Partial Summary Judgment to Establish That 20% Payments Constitutes A Breach of Express Trust and/or Breach of Loyalty;

The court has considered these motions and all the supporting materials, including the declarations submitted and the attachments to those declarations (presented in the several volumes of Defendants' Factual Record and Petitioners' Factual Record), and all other papers, evidence, and argument submitted in favor or opposition to the motions, as well as any other documents on file with the Court.

The court hereby ORDERS as follows:

I. State Defendants' Motion for Judgment on the Petitioners' Trust Claims Based on the ROII Enrollment Agreement is GRANTED, for the reasons set forth in the Letter Opinion;

II. Washington Builders Benefit Trust and Trustees' Motion for Judgment on Payment of Marketing Assistance Fees is GRANTED, for the reasons

1 set forth in the Letter Opinion;

2 III. Motion for Judgment That Petitioners' Claims Are Barred By the
3 Statute of Limitations and Equitable Defenses is GRANTED in part and DENIED
4 in part as follows: it is DENIED, except that the Court grants the motion only to
5 limit the cause of action regarding the duty to provide an annual report to the years
6 2005 through 2007, for the reasons set forth in the Letter Opinion;
7

8 IV. BIAW, MSC, WBBT, and Trustees' Motion for Judgment on Interest
9 Issues is DENIED, for the reasons set forth in the Letter Opinion;
10

11 V. Petitioners' First Motion for Partial Summary Judgment to Establish
12 Breach of Express Terms of Trust and Fiduciary Duties By Commingling, Interest
13 Skimming, and Failure to Supervise is GRANTED IN PART and DENIED IN
14 PART, as follows: (1) Petitioners have established that the inbound float interest is
15 subject to the trust and their motion is granted on this issue; (2) Petitioners have
16 established that BIAW-MSC commingled trust funds in its general account, and
17 their motion is granted on the issue of breach of the duty not to commingle
18 (whether this commingling caused any damage is an issue properly reserved for
19 trial); this motion is otherwise denied, for the reasons set forth in the Letter
20 Opinion;
21

22 VI. Petitioners' Second Motion for Partial Summary Judgment to
23 Establish That 20% Payments Constitutes A Breach of Express Trust and/or
24
25
26
27

1 Breach of Loyalty is DENIED, for the reasons set forth in the Letter Opinion.

2 DATED: 9/13/10

3 Carol Murphy
4 The Hon. Carol Murphy

5 Presented By:

6
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8 Attorneys for Building Industry Association of Washington,
9 BLAW Member Services Corporation,
10 Washington Builder Benefit Trust and certain trustees

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Exhibit A

0-000

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For Thurston County



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LETTER OPINION

Re: *Re Sources for Sustainable Communities, et al. v. BIAW, et al.*
Thurston County Cause No. 08-2-01674-6

Dear Counsel:

This matter came before the court on June 25, 2010 for hearing on six motions for summary judgment. The parties to these summary judgment motions are the "State Defendants" and the Plaintiffs. The "State Defendants" consist of Building Association of Washington (BIAW), BIAW-Member Services Committee (BIAW-MS), and the Washington Builders Benefit Trust (WBBT) and its trustees. The other defendants in this

lawsuit, known as the "Local Associations" were mostly dismissed by an earlier ruling and are not parties to these motions. The Plaintiffs are five Washington businesses that are employers and participate in the Building Industry Association of Washington's retrospective ratings program.

This court has considered the pleadings filed by the parties and the declarations and attachments associated with those pleadings. It also heard oral argument on June 25, 2010. In this letter opinion, the court makes rulings on each issue in the summary judgment motions.

Standard of Review

The standard summary judgment standards apply to these motions. The State Defendants also seek resolution on the merits under the Trust and Estate Dispute Resolution Act, ch. 11.96A RCW. TEDRA allows resolution of factual issues in this opinion. RCW 11.96A.100(10). This court declines to resolve all factual issues in this ruling, however, in favor of full resolution at trial as presented by the parties.

Statute of Limitations

The State Defendants argue that the statute of limitations bars this action because the plaintiffs reasonably should have discovered the alleged breach. This court denies summary judgment on this issue.

Under TEDRA:

An action against the trustee of an express trust for a breach of fiduciary duty must be brought within three years from the earlier of: (i) The time the alleged breach was discovered or reasonably should have been discovered; (ii) the discharge of a trustee from the trust as provided in RCW 11.98.041 or by agreement of the parties under RCW 11.96A.220; or (iii) the time of termination of the trust or the trustee's repudiation of the trust.

RCW 11.96A.070(1)(a). Here, the trustee has not been discharged and the trust has not terminated or been repudiated. Thus, the relevant question is whether, more than three years before filing this lawsuit, "the alleged breach was discovered or reasonably should have been discovered." *Id.*

The discovery rule does not require knowledge of the existence of a legal cause of action; instead, the statute of limitations begins to run when "the plaintiff knew or should have known all of the essential elements of the cause of action, i.e., duty, breach, causation and damages." *Gevaart v. Metco Constr., Inc.*, 111 Wn.2d 499, 501-02 (1988). The application of the discovery rule is generally a question of fact. *Matson v. Weidenkopf*, 101 Wn. App. 472, 482 (2000).

Three alleged breaches are at issue to the statute of limitations defense. Those breaches relate to the marketing assistance fee, the interest earned on out-bound float and in-bound float, and the failure to provide annual reports.

1. *Marketing Assistance Fee*

The first issue here relates to the marketing assistance fee. Stated very generally, the Plaintiffs allege that the State Defendants violated the trust by deducting and giving to BIAW a ten percent "marketing assistance fee" when only a small portion of that fee was actually used for marketing and promotion of the plan and when, allegedly, the fee is far greater than fair consideration for BIAW and BIAW-MSC's services to the trust.

The State Defendants assert that the statute of limitations elapsed on this claim because the Plaintiffs should reasonably have discovered the breach. These defendants point to facts from BIAW publications, news media, the member agreements, and the beliefs of employers who are not plaintiffs in this litigation. If true, the State Defendants' evidence shows that it was well-publicized that BIAW earned money from the retrospective ratings program and it spent that money on political activity. This evidence may also show that the Plaintiffs, exercising due diligence, could have discovered over three years before filing this complaint that BIAW retained a ten percent member service fee and spent some of it on political activities. This is insufficient, however, to support summary judgment.

Due diligence is a factual issue unless the facts are so persuasive that they constitute proof as a matter of law. See *Matson v. Weidenkopf*, 101 Wn. App. at 482. The evidence here is not so persuasive. Some media reports and BIAW newsletter commentaries explained that the BIAW spent retrospective ratings program funds on political efforts, but it is a question of fact whether a person exercising due diligence would discover that this expenditure breached the trust. Summary judgment is denied on the issue of whether the statute of limitations bars the marketing assistance fee claim.

2. *Interest*

The second issue involves interest. The Plaintiffs allege that the State Defendants violated the trust by employing certain financing practices for "in-bound float" and "out-bound float." "In-bound float" occurred directly after the Department of Labor and Industries paid premium refunds to BIAW. The evidence showed that BIAW held the refunds in its interest-bearing account for two days, and on at least one occasion for five days, before transferring the funds to the trust fund, WBBT. BIAW kept the interest that accrued during these two days instead of transferring it to the trust.

"Out-bound float" occurred after BIAW-MSC issued checks to employers, including plaintiffs, from the trust fund. In the period between when BIAW-MSC wrote the checks and when the employers cashed the checks, BIAW-MSC retained the interest earned in its bank account on the funds.

The State Defendants assert that it is obvious that they retained the out-bound float. They argue that it was clear that no interest accrued on a payment between the time the check was cut and when it was cashed because the amount on the check remained the same. However, the evidence does not support the conclusion that it was obvious that the interest accruing during that time period was kept as profit or was rolled over into future payments or was retained or dispersed in some other manner. There was no accounting until this court ordered one and other evidence of obviousness is lacking. This court denies summary judgment to the State Defendants on this ground.

3. Annual Statement

The State Defendants also assert that the Plaintiffs cannot complain of the lack of an annual statement because they were put on notice of the breach when they did not receive such a statement during the many years in which they each participated in the plan.

RCW 11.106.020 requires the trustee to mail or deliver an annual statement to each adult income trust beneficiary at least once each year. The State Defendants did not do this, and one may fairly conclude that the plaintiffs were notified that this provision was breached when they did not receive an annual statement each year.

This does not warrant holding that the statute of limitations bars this issue in its entirety, however. RCW 11.106.020 mandates a duty that must be performed each year and therefore the State Defendants separately breached this duty each year in which they failed to provide an annual statement. Thus, the statute of limitations bars this cause of action only for three years prior to filing the lawsuit.

This court previously limited the lawsuit to events occurring on or after September 27, 2003. The complaint was filed on July 16, 2008. Given the three year statute of limitations and the annual report requirement, as a matter of law the Plaintiffs knew, or should have known, on December 31, 2004, that no 2004 annual report would be forthcoming in that year or prior years. The next three years fall within the three-year statute of limitations and an action for failure to provide an annual report can be maintained for 2005, 2006, and 2007.

Accordingly, this court denies summary judgment on the statute of limitations except to the extent that this court limits the cause of action regarding the duty to provide an annual report to the years 2005 through 2007.

Equitable Defenses

The State Defendants next assert that equity bars this lawsuit. They argue that the plaintiffs knew about the actions subject to this lawsuit and acquiesced to it by continuing to be members of the plan. However, as discussed above, it is not clear whether the plaintiffs knew of any alleged breaches of trust. Instead, the State Defendants merely

show that the Plaintiffs did not agree with the BIAW's political activities but they continued to participate in the plan. Summary judgment on this basis is denied.

Governing Trust Instrument

A hotly debated issue in this case involves which instrument governs the trust. In 1994, BIAW created the Washington Benefit Builders Trust by a document commonly known in this litigation as the "1994 Declaration of Trust." The State Defendants argue that this is the trust document. The Plaintiffs never signed or saw this document and argue that the enrollment agreements that they signed are the governing trust document. This court holds that both documents govern the trust.

The State Defendants first attempt to argue, unpersuasively, that the enrollment agreements could not form trusts. They assert that the enrollment agreement must be only a contract or a trust, but cannot be both. They cite foreign case law and one Washington case that does not stand for this proposition. The Washington case cited, *Grandy v. Luther*, actually held that "if the necessary elements are present, a writing may create two sets of obligations, such as a contract and a trust." 12 Wn. App. 542, 545 (1975). The only disputed element of a trust in this case is the identity of the settlor, and this court may resolve that element as a matter of law.

The primary issue in dispute here is which parties are the settlors, because resolution of that issue will determine whether the enrollment agreement is the trust instrument. A "trust instrument" is a document in which the settlor transfers equitable title in property to the trust beneficiary and transfers a property interest to the trustee. BOGERT, GEORGE G., ET AL., BOGERT'S TRUSTS AND TRUSTEES § 147. A "settlor" (i.e., trustor) is the person who has legal competence to make a disposition of the legal title to the property, such as the property's owner. RESTATEMENT (SECOND) OF TRUSTS § 3; 76 AM. JUR. 2D TRUSTS § 49. The settlor can also be a beneficiary of the trust. RESTATEMENT (SECOND) OF TRUSTS § 114. "If a beneficiary transfers part of the property or supplies part of the consideration to fund a trust, the beneficiary is ordinarily settlor to the extent of a fractional portion appropriate to reflect his or her proportionate share of the funding." RESTATEMENT (THIRD) OF TRUSTS § 58, CMT. F.

Here, the 1994 Declaration of Trust was drafted and signed by BIAW in order to create the WBBT. The Declaration of Trust was not signed by employers who participate in BIAW's industrial insurance premium return program (ROI) fund. However, no ongoing trust could exist without the enrollment agreements because assets would not be deposited into the trust. The 1994 Declaration of Trust was never disclosed to employers and is not incorporated into any document that the participating employers saw. The enrollment agreements are drafted by BIAW and signed by employers who participate in the ROI program, but they are not formally acknowledged or agreed to by BIAW's Board.

The parties dispute the identity of the settlor based on the structure of BIAW's ROII program. The State Defendants argue that they own the premium refunds because the Department of Labor and Industries pays the refunds directly to BIAW and does not oversee the refunds' distribution to employers. The plaintiffs argue, on the other hand, that they own the refund and the State Defendants are merely a conduit for the funds. The plaintiffs are correct; they own the refunds subject to the conditions the parties agreed to in the enrollment agreements.

Washington law provides for refunds of industrial insurance premiums in certain circumstances to groups of employers through their chosen sponsoring organization. The purpose of the law is to provide incentives to employers to increase workplace safety. Refunds are based on the participating employers' workers' compensation records. Although the Department of Labor and Industries does not regulate the distribution of refunds to employers, it states that "[i]t is the responsibility of the sponsoring organization to distribute any refund to the group members." WAC 296-17-90445. Under this regulatory scheme, it appears that the regulation contemplates that employers own the refunds.

The parties also understood that the employers owned the premium refund, subject to deductions and conditions agreed to in the enrollment agreements. The 1994 Declaration of Trust established the WBBT "on behalf of Employer Participants" and it makes no claim that the State Defendants own the funds outright. The member enrollment agreement, also written by BIAW, states that "[b]y execution of this Agreement, the Member absolutely assigns to the Trust all Premium Returns that may be payable to DLI on behalf of the Member" This clause expresses an understanding by all parties that the refunds belong to the employers and are held in trust by the sponsoring organization until they are distributed. Under both the L&I regulations and the parties' understanding, the employers own these refunds, subject to the enrollment agreements, and therefore, the employers are the settlors. As such, the enrollment agreements are trust instruments. *See* BOGERT, GEORGE G., ET AL., *BOGERT'S TRUSTS AND TRUSTEES* § 147 (trust instruments are documents in which settlor transfers assets into trust).

This court further holds that the 1994 Declaration of Trust is a valid trust instrument. The State Defendants concede this point. They assert that the 1994 Declaration of Trust was incorporated into the enrollment agreements and that they abided by its terms. Under equitable principles, the State Defendants bound themselves to this document's terms. Accordingly, this court holds that both the enrollment agreements and the 1994 Declaration of Trust are valid trust instruments.

Marketing Assistance Fee

The parties also present cross motions for summary judgment regarding the marketing assistance fee. To resolve this issue, the court must answer three questions. First, did payment of a flat ten percent fee to BIAW and a flat ten percent fee to Local

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Associations violate the trust instruments? Second, were the trustees of WBBT required to use BIAW's fee for only marketing and assistance of the plan or to oversee that it was used in this manner? Third, did the State Defendants violate the trust by paying the marketing assistance fees in three annual installments? This court will address each question in turn.

1. *Payment of Flat Fees*

This court must resolve whether payment of flat ten percent fees violated the trust instruments. It did not.

This court determines the settlor's "intent in a trust document by construing the document as a whole." *Bartlett v. Bellach*, 136 Wn. App. 8, 19 (2006). "Where the meaning of an instrument evidencing a trust is unambiguous, the instrument is not one requiring judicial construction or interpretation." *Templeton v. Peoples Nat'l Bank of Wash.*, 106 Wn.2d 304, 309 (1986). "A trust is ambiguous if it is susceptible of more than one meaning; ambiguity is a question of law." *Waits v. Hamlin*, 55 Wn. App. 193, 200 (1989). Further, "if the intention may be gathered from [the trust] language without reference to rules of construction, there is no occasion to use such rules, and the actual intent may not be changed by construction." *Templeton*, 106 Wn.2d at 309. Accordingly, extrinsic evidence should not be considered where "intent can be derived solely from the four corners of the trust document." *Id.*

Whether a trust instrument is ambiguous is a question of law. *Waits v. Hamlin*, 55 Wn. App. 193, 200, *review denied*, 113 Wn.2d 1025 (1989). If the trust instrument is ambiguous, however, extrinsic evidence is admissible to show the settlor's intent when executing the document and the issue becomes factual. *In re Estate of Curry*, 98 Wn. App. 107, 113 (1999).

The 1994 Declaration of Trust contains two relevant sections:

Section 10. The trustees shall pay or provide for the payment of the Funds of all reasonable and necessary expenses of BIAW or any other entity in administering the retrospective rating program on behalf of Employer Participants.

Section 11. Before distribution of the balance of each Fund left after payment of all expenses and final Adjustments by DLI, the Trustees shall to [sic] pay to BIAW a marketing assistance fee of 10% of all Employer Participants' distributive shares of the Fund. In addition, the Trustees shall pay to any local associations with members who are Employer Participants in a Plan a marketing assistance fee of 10% of the distributive share of the Fund allocated to Employer Participants who are members of such local association.

Section 11 of this document plainly allows a ten percent flat fee to BIAW and a ten percent flat fee to local associations. The plaintiffs assert that the term "marketing assistance fee" is a contingent clause and, therefore, the ten percent fees to BIAW and locals are acceptable only if they are used for "marketing assistance." The plaintiffs provide evidence that those fees primarily generated profit and the actual marketing of the plan required a very small percentage of this money.

However, this interpretation is inconsistent with Section 10 and the opening clause of section 11. Section 10 provides a separate authorization to pay all reasonable and necessary expenses to administer the retro plan. And section 11 provides that the "marketing assistance fee" is deducted after paying all expenses. The marketing assistance fees are plainly flat fees under the Declaration of Trust. The duty to pay these fees are not contingent on any event or expenses.

The parties also dispute the meaning of the fees within the enrollment agreements. The relevant portion of the agreement reads:

By execution of this Agreement, the Member absolutely assigns to the Trust all Premium Returns that may be payable by DLI on behalf of the Member, to protect the Member and the BIAW from Penalties and from other future obligations to DLI with respect to Industrial Insurance for the Coverage Period and any other period. The Member further authorizes the Trustee to pay from the Premium Returns the balance of the Enrollment Fee and such *costs and expenses* for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer ten percent (10%) of the Participants' Premium Returns applicable to the Coverage Period to local associations and 10% to BIAW *for marketing and promotion of the Plan*.

MEMBER AGREEMENT, AT RECITAL (A)(4)(B) (emphases added).

The Plaintiffs argue that the term "for marketing and promotion of the Plan" creates a duty to deduct these fees only if needed to market and promote the plan and that duty was not fulfilled because a small percentage of the fees were used in this manner. The plain language of the agreements provides otherwise. Unlike the fee for costs and expenses, in which BIAW is to deduct the exact cost of the expenses, the marketing fees total 20 percent of the premium return, regardless of the actual expense. The agreement does not state, for instance, that "up to ten percent" may be deducted. Payment of a flat fee is required.

Under the plain language of the Declaration of Trust and the enrollment agreements, the marketing assistance fee is a flat fee that is not contingent on its use. It is best construed as consideration. Courts do not generally inquire into the adequacy of consideration, *Browning v. Johnson*, 70 Wash.2d 145, 147 (1967). The Plaintiffs have not persuaded this court that doing so is a proper exercise of equitable power under these

circumstances, when they knowingly entered into enrollment agreements that clearly provide for flat fees of ten percent each to BIAW and the Local Associations. Accordingly, this court rules that the State Defendants were required to pay ten percent of the premium returns to BIAW and ten percent to the Local Associations.

2. Use of Fees

The question remains, however, whether the Defendants' fees may be deducted and returned by the Defendants if the expense of marketing and promotion is less than the fee generates or whether the Defendants have a duty to ensure that the fees are used solely for marketing and promotion.

The State Defendants do not argue that the ten percent fees were wholly used solely for marketing and promotion of the plan. The Plaintiffs, in contrast, provide evidence that only a small percentage was used for these purposes, by their calculation. However, there is no evidence that this flat fee must be used for a specific purpose, such as advertising the plan or printing promotional materials. More importantly, the term "marketing and promotion of the plan" may be construed very broadly to encompass many activities. The Plaintiffs do not present authority for the proposition that BIAW must monitor the way these fees are used. For these reasons, this court holds that the State Defendants are not liable for breach of trust for improperly expending the marketing assistance fees.

3. Timing of Payment

A narrow issue also remains regarding when these fees were paid. The Declaration of Trust provides that the fee will be paid "[b]efore distribution of the balance of each Fund left after payment of all expenses and final Adjustments by DLI." It is undisputed that the fee was paid in three annual installments, just as the premium refunds are paid, and after certain adjustments common-sense reading of the above language shows that this timing of payments was not improper. Summary judgment is granted to the State Defendants on this issue.

Interest, Commingling, Failure to Earmark, and Failure to Supervise

The next set of issues relates to interest, commingling, failure to earmark, and failure to supervise. The State Defendants move for summary judgment regarding in-bound float, out-bound float, and waiver of interest issues. The plaintiffs move for summary judgment regarding in-bound float, out-bound float, commingling and failure to earmark trust funds, and failure to supervise BIAW-MSC.

1. Facts

The parties appear to agree on the following facts, unless indicated otherwise. The Department of Labor and Industries pays premium refunds to BIAW in three

installments for each year. BIAW deposits these refund checks directly into MSC's bank account. BIAW-MSC keeps other funds in that account and does not set it aside in a sub-account or otherwise designate it as trust funds at this time. The State Defendants assert that they could always trace the funds while they were in BIAW-MSC's account.

BIAW-MSC must keep the premium refunds in its bank account for at least two days to comply with bank policy. Other banking structures were possible, but the State Defendants chose this one. BIAW-MSC kept the refunds in this account for at least two days and concedes that it did not always transfer the funds as soon as possible to WBBT.

Primary payments, the first of the three installments, were transferred after two days with the exception of one mistake in which the primary payment was transferred after five days. Interim payments were not transferred two days after deposit. The State Defendants explain that "because they are much smaller, it did not occur to MSC's accountant that it was as urgent to transfer them to WBBT as quickly."¹ And BIAW-MSC followed a different practice if an appeal was pending to dispute the refund. In cases of appeals, BIAW-MSC's accountant would "sometimes wait to see whether those appeals will yield additional payments so that the interim payments can be transferred together."²

Regardless of whether BIAW-MSC transferred the funds as soon as possible under the bank's policy, it kept all the interest. In 2006, BIAW-MSC kept \$14,424 in interest on the primary adjustment, \$155 on the first interim adjustment, and \$1,695 on the second interim adjustment.

After the two or more days elapse, BIAW-MSC transfers the funds to WBBT. WBBT only holds the funds, it does not administer them. When it is time to distribute the trust funds to member employers, WBBT transfers the funds to BIAW-MSC and BIAW-MSC cuts the checks to the member employers.³ During the time in between when BIAW-MSC cuts the checks and when they are cashed, BIAW-MSC keeps the accrued interest instead. This is called "out-bound float interest."

2. In-Bound Float Interest

Both parties seek summary judgment on the issue of in-bound float interest. This court holds that this interest belongs to the trust and the State Defendants breached the trust by retaining it.

"All increase in the value of a trust fund derived from investment or reinvestment returns or from interest earned on the fund, belongs to, and becomes a part of, the corpus

¹ Defendant's Motion for Judgment on Interest Issues, at 5.

² *Id.*

³ There is some evidence that it would be onerous to require WBBT to cut checks because it would have to be done by the bank itself, which may refuse to do so and would certainly charge a fee for this service.

of the trust estate in the absence of some specification to the contrary in the instrument or the statute creating the trust." *Lynn v. City of Longview*, 15 Wn.2d 528, 533 (1942).

The State Defendants assert that the premium refunds are not subject to the trust until they are transferred to WBBT. Until that happens, they argue, the beneficiaries have no property interest in the funds and the State Defendants may do as they wish, taking fees and interest from the premium refunds with impunity. They cite RCW 11.104A.070, which reads, in relevant part:

(a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life[.]

Neither the 1994 Declaration of Trust nor the enrollment agreements specify a date in which income interest begins. The State Defendants argue that these funds are not subject to the trust until they are "transferred to a trust" by literally transferring the money to WBBT's account.

As previously resolved, however, the employers are the settlors and own the premium refunds at all times after the refunds are issued, subject to the terms of the enrollment agreement. The refund is transferred to a trust according to the terms of the enrollment agreement once BIAW receives the refund. It is irrelevant when the funds are transferred to the WBBT account. Moreover, BIAW could have developed a banking system that would allow it to immediately deposit the funds in the WBBT account or to account for interest and pay that interest into the trust account. Its failure to do so should not result in a financial benefit to the State Defendants. This court holds that the in-bound float interest is subject to the trust. The Plaintiffs' summary judgment motion is granted on this issue.

3. Out-Bound Float Interest

Both parties also seek summary judgment regarding out-bound float interest. This court denies summary judgment on this issue because there remain questions of fact as to whether interest was retained as trust funds or as profit and the amounts retained.

Additionally, it is unclear how much, if any, retained out-bound float interest was retained after the checks were within the dominion and control of employers. Once the employers received the payments, it was solely their discretion when to deposit them into their accounts. Summary judgment is denied on the issue of out-bound float interest.

4. *Waiver of Liability*

The final issue in the State Defendants' motion is waiver. This court denies summary judgment on this ground.

A settlor may relieve the trustees of statutory trust duties by express provision. RCW 11.97.010. However, "[i]n no event may a trustee be relieved of the duty to act in good faith and with honest judgment." RCW 11.97.010. Here, the Declaration of Trust states:

The Trustees shall not be liable for any mistake or error of judgment in the administration of the Trust, except for willful misconduct, so long as they continue to exercise their duties and powers in a fiduciary capacity primarily in the interests of BIAW, the local associations, and the Employer Participants.

Art. IV, § 17. And the enrollment agreement states:

The Member hereby releases and agrees to indemnify and hold BIAW, its subsidiary, the Trust, and all the members of the Trust harmless from any and all liability for any decision which may now or hereafter b[e] made by BIAW, its subsidiary, or the Trust with regard to the Plan, any Premium Returns (including interest, principal and profit), the payment of any such sums or the investment of such sums.

Article B-10.

The State Defendants argue that these agreements abrogate their duties under the trust. However, the ultimate issue for each alleged breach of fiduciary duty is whether the defendants exercised good faith and honest judgment. These duties cannot be abrogated by agreement. RCW 11.97.010. This court denies summary judgment on this issue.

5. *Commingling and Failure to Earmark*

The Plaintiffs move for summary judgment for commingling the trust funds in BIAW-MSC's general account. Commingling of personal funds with trust funds may constitute self-dealing that violates the duty of loyalty to beneficiaries. *In re Marriage of Petrie*, 105 Wn. App. 268, 276 (2001). The State Defendants concede that they commingled the funds.⁴ Based on the State Defendants' concession, the Plaintiffs'

⁴ OPPOSITION TO PLAINTIFFS' FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING INTEREST ISSUES, AT 12-13 ("When retro refunds are transmitted from DLI to MSC and then to WBBT, or distributions are transmitted from WBBT to BIAW-MSC and then to the participants and local associations, they temporarily rest in accounts at BIAW-MSC. These accounts also contain other funds of BIAW-MSC.")

motion is granted on the issue of breach of duty only. The State Defendants argue that this breach did not cause damages, but they do not bring a cross motion for summary judgment on this issue and therefore damages from this breach is an issue properly reserved for trial.

The State Defendants correctly assert that they could have been paid for administrative costs associated with running the BIAW ROII program. The BIAW has chosen not to bill for or be paid for its administrative costs. However, the State defendants cannot use the unpaid administrative costs to claim that improper interest payments or commingling of funds are simply 'a wash.' This argument fails as a matter of law. The question is whether a particular breach of fiduciary duties occurred and proximately caused damage. The present question is not, as the State Defendants assert, whether the Plaintiffs ultimately benefited from BIAW's actions.

6. Failure to Supervise

The parties agree that BIAW designated BIAW-MSC as an agent of the trust and tasked BIAW-MSC with administering it. The Plaintiffs seek a ruling on summary judgment that BIAW failed to adequately supervise BIAW-MSC. This court denies this motion.

A trustee has the right to designate agents to administer the trust. RCW 11.98.070(27). The trustee must select and retain the agent with "reasonable care." RCW 11.98.070(27)(c). Further, the trustee may breach the trust if it does not exercise adequate supervision over the agent's conduct. RESTATEMENT (SECOND) TRUSTS § 225. The 1994 Declaration of Trust also requires the trustees to "act prudently in the delegation or allocation of responsibilities to other persons" and to "exercise reasonable care to prevent any other fiduciary from committing a breach of the fiduciary's obligations and responsibilities." 1994 DECL. OF TRUST, ART. IV, § 20.

The State Defendants argue that it was solely their discretion to delegate trust duties to another entity. However, this argument relates to the decision about to whom it could properly delegate, while the Plaintiffs complain that there was failure to supervise a properly-delegated entity.

The parties dispute the facts. The Plaintiffs argue that WBBT's trustees exercised almost no oversight of BIAW-MSC. The State Defendants alternatively argue that the trustees were aware of the manner in which BIAW-MSC processes payments and retained interest.

The Plaintiffs provide no evidence that the alleged failure to supervise caused any damages. Nor do they argue that, if BIAW had better supervised BIAW-MSD, then the alleged breaches would not have occurred. There is no evidence supporting damages. For this reason, this court denies summary judgment on this issue.

The court will sign findings of fact and conclusions of law consistent with this ruling upon presentation.

Sincerely,

Carol Murphy

Carol Murphy
Superior Court Judge

cc: Court Clerk

Appendix 4:
1994 Declaration of Trust
(emphasis added)

Trial Exhibit 2027
CP 8904-8914

WASHINGTON BUILDERS BENEFIT TRUST

DECLARATION OF TRUST

AS OF JANUARY 1, 1994

PUBLISHED AND DISTRIBUTED: _____

DECLARATION OF TRUST
ESTABLISHING THE
WASHINGTON BUILDERS BENEFIT TRUST

AS OF JANUARY 1, 1994

WHEREAS, the Board of Directors of the Building Industry Association of Washington approved the formation of the Washington Builders Benefit Trust on December 5, 1989.

WHEREAS, the Board of Directors of the Seattle Master Builders Association approved the formation of the Washington Builders Benefit Trust on November 15, 1989.

WHEREAS, the Trustees of the Washington Builders Benefit Trust determined it is in the best interests of the trust and BIAW members that a new trust be formed to continue to hold Employer Participant retrospective rating program adjustments until completion of final adjustments by the Department of Labor and Industries; and

WHEREAS, the undersigned Trustees of the new Washington Builders Benefit Trust have agreed to form that new trust, and to hold such funds of Employer Participants solely under the terms of this Declaration of Trust;

THEREFORE, it is hereby agreed that the Declaration of the Washington Builders Benefits Trust is hereby established and adopted to act on behalf of Employer Participants under the terms and conditions appearing on the following pages.

ARTICLE I - DEFINITIONS

The following definitions shall govern the interpretation of this Declaration of Trust:

A. "BIAW" shall mean the Building Industry Association of Washington, incorporated in the state of Washington as a non-profit corporation, in its present or amended form.

B. "Adjustments" shall mean industrial insurance premiums refunded by the state of Washington Department of Labor and Industries (DLI) or additional premiums assessed by the DLI pursuant to a Plan.

C. "Agent" shall mean any person authorized and directed by the Trustees to engage in or conduct business deemed to be in the interest of, or on behalf of or related to, the operations of the Trust.

D. "Declaration of Trust" shall mean this instrument, including any amendments hereafter made in compliance with the terms of this instrument.

E. "Employer Participant" shall mean any person, partnership, joint venture, corporation, company or sole proprietorship who is engaged in the building industry in Washington, who is a member in good standing of BIAW, who has become or hereafter becomes a party to this Agreement by executing an Employer Participation Agreement, and who has been, or is hereafter, accepted by the Trust as an Employer Participant for a specified Plan Year.

F. "Employer Participation Agreement" shall mean the agreement which an Employer Participant is required to execute prior to participating in a Plan for each Plan Year.

G. "Financial Manager" shall mean the financial institution, investment firm, or other person or entity appointed by the Trustees to manage, invest or reinvest part or all of the Funds of the Trust.

H. "Plan" shall mean an industrial insurance retrospective rating plan existing pursuant to an agreement negotiated between the BIAW and the DLI, established according to the provisions of the Washington State Retrospective Rating Program, pursuant to WAC 296-17-912, et. seq. Each such Plan shall concern the payment of industrial insurance premiums by Employer Participant for one (1) year duration, beginning and ending on the dates stated in the Plan (the "Plan Year"), and shall further concern DLI Adjustments relating to that Plan Year. Each such Plan shall be designated by a Plan Year corresponding to the year in which the Plan is begun -- e.g., Plan Year 1990 would relate to the Plan beginning July 1, 1990.

I. "Trustees" or "Board of Trustees" shall mean the Trustees hereinafter set forth and their successors in trust appointed as hereinafter provided.

J. "Fund" shall mean all things of value held by the Trust for the benefit of the Employer Participants, including all Adjustments and all interest, dividends, refunds or income of any sort earned on the Fund, and any other property of any kind whatsoever received and held in trust for the benefit of the Employer Participants in connection with one or more Plans. A Fund for accounting purposes shall be created for each Plan Year. "Funds" shall mean the pool created by combining each Fund for investment purposes.

K. "Trust Estate" shall mean all of the property and rights owned or held by the Trust, including the Funds and all other property or rights of any kind whatsoever.

L. "Trust" shall mean the entity created by this Declaration. The Trust created herein shall act through its Board of Trustees and Agents. The term "discretion of the Trust" means discretion exercised by the Trustees, or by an Agent of the Trust when the power to exercise such discretion has been delegated by the Trustees to the Agent.

ARTICLE II - ESTABLISHMENT AND PURPOSE OF TRUST

Section 1. The Washington Builders Benefit Trust is hereby established and created for the following purposes:

A. To ensure the financial security of each Fund by establishing financial, risk, and other criteria and conditions for Employer Participant's participation in Plans.

B. To receive, in trust for the benefit of BIAW and the Employer Participants, Adjustments pursuant to each Plan.

C. To create and administer a Fund for each Plan, to receive, reserve, invest, distribute and account for the Adjustments received pursuant to each plan, to be held in trust for the benefit of BIAW and the Employer Participants.

D. To distribute Adjustments and any interest, return or other property obtained as a result of administration of a Fund, to the Employer Participants entitled to the Fund during the term of the Plan and at the conclusion of the Plan.

ARTICLE III - TRUSTEES: APPOINTMENT, REPLACEMENT, MEETINGS

Section 1. There shall be seven (7) Trustees of the Trust. The seven positions on the Board of Trustees shall be appointed positions. The power to appoint the seven appointed positions shall be held by the President of the BIAW. Each Trustee appointed by the President of the BIAW shall serve a term of four years, except that the initial appointments shall be staggered terms of one, two, three and four years, as described on the signature page of this Declaration. Trustees may be reappointed for additional terms. Each appointed Trustee must be actively engaged in the building industry within the state of Washington, and must be a member in good standing of the BIAW. At each annual meeting of the Trust, the seven Trustees shall elect from their number one Trustee to serve as chairperson for the following year.

Section 2. The Board of Trustees shall act by majority vote of the Trustees present at a meeting or participating in a telephone conference call. Proxies will be allowed in writing for specific issues, and are to be given to the Chairperson of the Trustees. Proxies are to be specified for each item, or each item identified individually. The Trustees shall promulgate policies to govern its proceedings. Once adopted, said policies shall govern

the proceedings of the Board unless amended in the same manner provided in this Declaration for amendments to the Trust.

Section 3. Any appointed Trustee who misses two consecutive meetings will be removed from office. Such a Trustee may be immediately reappointed once extenuating circumstances are accepted by the Trustees.

Section 4. Any appointed Trustee may resign at any time, with or without cause, by giving written notice of his or her intention to so resign to the Board of Trustees. A two-thirds (2/3) majority of the Board of Trustees may remove, with or without cause, any appointed Trustee, by giving written notice to the Trustee being removed and to the Board of Trustees by registered mail no later than five (5) days prior to such action. Within thirty (30) days of such resignation or removal, the President of the BIAW shall appoint a successor Trustee. No successor Trustee shall be liable or responsible for any acts or defaults of any predecessor Trustee, or for any losses or expenses resulting from or occasioned by anything done or neglected to be done in the administration of the Trust Fund, prior to his or her becoming a Trustee or subsequent to his or her resignation or removal as a Trustee. A successor Trustee shall not be required to inquire into or take any notice of the prior administration of the Funds. Any successor Trustee shall become vested with all the estate, rights, powers, discretion and duties of his predecessor Trustee with like effect as the predecessor Trustee.

Section 5. The Trustees shall meet at least annually and more often if required at such location as established by a majority of the Trustees. The Chairperson of the Trustees shall set the date and time of each meeting, and notice thereof shall be furnished to each Trustee by the Chairperson not less than ten (10) days prior to the date of such meeting. A telephone conference call may be substituted for a meeting, at the discretion of the Chairperson, provided that a ten (10) day notice is given for meetings. Each notice shall specify the date, time and location of such meeting and specify the purpose thereof and any action proposed to be taken at the meeting or telephone conference call.

Special meetings of the Trustees, or telephone conference calls, may be held at any time and place without notice provided all Trustees execute a waiver of notice and consent to the meeting or conference call, and all action taken by such method shall be deemed proper and effective.

For the purposes of a duly called and noticed meeting, or telephone conference call, of the Board of Trustees, a quorum shall consist of five (5) Trustees who are present or who participate in the telephone conference call.

The Chairperson, acting Chairperson or his/her designee shall cause to be kept minutes of all meetings, proceedings and acts of the Board and such minutes of the Board of Trustees shall be sent to all Trustees.

ARTICLE IV - TRUSTEES: POWERS, DUTIES AND RESPONSIBILITIES

Section 1. The Trustees shall hold in trust for the benefit of the Employer Participants any Funds transferred to the Trust from predecessors trusts existing for the same purposes as this Trust, and all Adjustments transferred to BIAW by the DLI together with all accruals thereto and income therefrom. The Trustees shall create and administer a Fund for each Plan to receive, reserve, invest, pay out and account for the Adjustments received pursuant to each Plan, to be held in trust for the benefit of the Employer Participants. The Funds may be pooled by the Trustees for purposes of investment and management. The Funds shall be managed, invested and reinvested by the Trustees in any shares, securities or other financial instruments, whether or not income-producing, deemed by the Trustees to be in the best interest of BIAW and the Employer Participants; or, alternatively, the Trustees may, by affirmative vote of a majority of the Trustees, employ or contract with a Financial Manager to perform such duties as may be delegated by the Trustees. The Trustee may authorize a Financial Manager to manage, invest or reinvest the Fund and to execute any and all documents necessary for such management, investment and reinvestment.

Section 2. Distributions of Funds to Employer Participants shall be in amounts and at times determined by the Trustees in their sole discretion, provided that all of a Fund shall be distributed to Employer Participants within a reasonable period of time following DLI's notice of final Adjustments with respect to a Plan.

Section 3. The Trust may receive and merge or combine with this Trust any trust established for Plans preceding establishment of this Trust, provided that such prior trust contain terms for administration and management of the Funds not inconsistent with the terms of this Declaration.

Section 4. The Trustees shall have the power to determine the allocation of receipts and expenses between income and principal in accordance with the Washington Principal and Income Act.

Section 5. The Trustees shall assess the value of shares, securities or other financial instruments and such valuation shall be conclusive on all parties. The Trustees shall not be required to make any provision on account of the diminution or increase in value of any investment at any time constituting a part of the Trust.

Section 6. The Trustees shall have the power to promulgate and establish rules policies for its activities with respect to Funds, to take any other such action and execute any such documents with respect to the Funds, and the benefits provided, as they may deem necessary or advisable in order to carry out the purposes for which the Funds are held.

Section 7. The Trustees are empowered to vote and exercise any rights of ownership with respect to any stocks, bonds, or other security of any corporation, association or trust which at any time are a part of the assets of the Funds, or otherwise to consent to or request any action on the part of such corporation, association or trust, or to give general or special proxies or powers of attorney, with or without power of substitution; to participate in reorganization, recapitalizations, consolidations, mergers or similar transactions with respect to such securities; to deposit such stocks or other securities in any voting trust or with any protective or like committee or with a trustee; and to exercise any of the powers of an owner with respect to such stocks or other securities or any other property forming a part of the Fund as it may deem advisable and in the best interest of the Fund.

Section 8. The Trustees are authorized to borrow or raise funds for the purposes of the Trust, in such amounts and upon such terms and conditions as they may deem advisable; to issue instruments of debt for the Trust for any sum so borrowed; and to secure the repayment thereof by pledging all or any part of the assets of the Fund for which the borrowing was done. No person or other party lending funds to the Trust shall be bound to determine the application of the Funds lent or to inquire into the validity, expediency or propriety of any such borrowing.

Section 9. The Trustees may employ Agents or other personnel who will administer the Funds; pay or provide for the payment from the Funds of all reasonable and necessary expenses in administering the affairs of the Trust, including, without limitation, all expenses which may be incurred in connection with the establishment of the Trust; employ administrative, legal, accounting, other expert and clerical assistance; purchase or lease materials, supplies and equipment which the Trust, in its discretion, deems necessary or appropriate in the performance of the Trustees' duties, or the duties of the Agents or employees of the Trust.

Section 10. The Trustees shall pay or provide for the payment from the Funds of all reasonable and necessary expenses of BIAW or any other entity in administering the retrospective rating program on behalf of Employer Participants.

Section 11. Before distribution of the balance of each Fund left after payment of all expenses and final Adjustments by DLI, the Trustees shall to pay to BIAW a marketing assistance fee of 10% of all Employer Participants' distributive shares of the Fund. In

addition, the Trustees shall pay to any local association with members who are Employer Participants in a Plan a marketing assistance fee of 10% of the distributive share of the Fund allocated to Employer Participants who are members of such local association.

Section 12. The Trustees shall keep, or cause to be kept, true and accurate books of account and records of all their transactions, which shall be reviewed at least annually by a certified public accountant. A statement of the results of such review shall, at all times during regular business hours, be available for inspection by BIAW, local associations and Employer Participants at the BIAW office. The Trustees shall annually furnish to the BIAW and participating local associations reports on the status of the Funds, the application of the Funds and other information pertinent to the administration of the Funds.

Section 13. The Trust may purchase insurance for Trustees, for any other party serving at any time as fiduciary with respect to the Trust, or for the Trust itself, to cover liability or losses incurred by reason of the act or omission of the Trustees or any such fiduciary.

Section 14. All reasonable expenses of the Trustees actually incurred in the performance of their duties as Trustees may be chargeable to the Trust upon submission and approval of a majority of Trustees.

Section 15. The Trustees may obtain membership, in the name of the Trust, in a recognized organization established for the education and training of the Trustees, may authorize one or more of the Board of Trustees to attend such organizations' educational conferences and may authorize the payment by the Trust of the reasonable expenses actually incurred by said Trustee in attending said educational conferences. The Trustees may also authorize one or more of the Board of Trustees to attend such other conferences as are directed at and pertinent to the provisions, management and administration of benefits and may authorize the payment by the Trust of the reasonable expenses actually incurred by said Trustees.

Section 16. All activity related to checking, savings and any other asset accounts held by any financial institution shall require two (2) signatures. Authorized signatories shall be the Chairperson and/or his/her designee.

Section 17. No Trustee shall be required to give any bond or other security. The Trustees shall not be liable for any mistake or error of judgment in the administration of the Trust, except for willful misconduct, so long as they continue to exercise their duties and powers in a fiduciary capacity primarily in the

interests of BIAW, the local associations, and the Employer Participants.

Section 18. The powers granted to the Trustees may be exercised in whole or in part, from time to time, and shall be deemed to be supplementary to the general powers of Trustees pursuant to law.

Section 19. The Trustees shall discharge their duties solely in the interest of the Employer Participants and with the care, skill, prudence and diligence, under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like intentions.

Section 20. The Trustees and any other party serving as a fiduciary with respect to the Trust shall act prudently in the delegation or allocation of responsibilities to other persons, and the Trustees shall exercise reasonable care to prevent any other fiduciary from committing a breach of such fiduciary's obligations and responsibilities hereunder.

ARTICLE V - AMENDMENT OF THE TRUST

This Trust may be amended from time-to-time by a two-thirds (%) majority vote of all Trustees, and all Employer Participants shall be bound thereby; provided, however, that in no event shall the Fund or any part thereof be used for any purpose other than those set forth herein, nor shall any amendment be made which shall divert the Trust, or any part thereof, to a purpose other than as set forth in this Declaration.

ARTICLE VI - DURATION AND TERMINATION OF THE TRUST

This Trust shall be of indefinite duration and shall continue until termination at the recommendation of the Trustees and with the concurrence of the BIAW's Board of Directors when termination would be in the best interests of the Employer Participants. In no event shall the Trust continue for a period longer than that permitted by law.

ARTICLE VII - GENERAL PROVISIONS

Section 1. No share or interest or any portion thereof of any Employer Participant hereunder shall vest until actually paid to such Employer Participant during or at the conclusion of the Plan by the Trustees nor shall the same be liable for the debts of any Employer Participant or subject to the process or seizure of any court nor an asset in the bankruptcy of any Employer Participant, and no Employer Participant hereunder shall have power to anticipate, alienate or encumber its interest in the Trust or the income therefrom. If by reason of any bankruptcy, judgment or

other cause any Employer Participant cannot receive and enjoy the benefits hereof, then the benefits accruing during the pendency of such judgment or proceeding that would ordinarily be distributable to the Employer Participant so affected may be held by the Trustees temporarily or distributed to any other Employer Participant or Employer Participants hereunder, as the Trustees shall elect.

Section 2. No party dealing with the Trustees shall be obligated to determine the application of any funds or property of the Funds or to determine that the terms of the Trust have been complied with or to inquire into the necessity or expediency of any act of the Trustees. A receipt given by the Trustees or their Agents for any money or other properties received by them shall effectually discharge the party paying or transferring the same. Each instrument executed by the Chairperson or his/her designee acting on behalf of the Trust, shall be conclusive evidence in favor of any party relying thereon as follows: That at the time of execution and delivery of the instrument, the Trust was in full effect; that the instrument was executed in accordance with the Trust; and that the Trustees were duly authorized to execute the instrument.

Section 3. Should any provision in this Trust or any Plan, or any rule or regulation adopted hereunder be deemed invalid or be determined to be invalid by any authoritative body, such invalidity shall not affect any of the other provisions of the Trust or any Plan or Fund; providing, that if such invalidity shall make impractical the further operation of any Fund under this Trust, the Trust and that Plan shall be forthwith amended so as to provide for its effective continuance according to its general purposes.

Section 4. When used herein, the masculine, feminine, or neuter gender and the singular or plural number shall each be deemed to include the others in all cases where such construction would so apply.

Section 5. The Trust is executed and accepted by the parties hereto in the state of Washington and questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of the state of Washington.

Section 6. Any notice required to be given under the terms of the Trust or rules and regulations adopted by the Trustees shall be deemed to have been duly served if delivered personally to the person to be notified in writing, or if mailed, by placing same in a sealed envelope with sufficient postage prepaid thereon, addressed to such person at his last known address as shown in the records of the Trust and deposited in a depository of the United States mails, or if by such other acceptable common carrier, when sent to such person at such last known address. In the event that notice is given, it shall be deemed to have been served forty-eight

Appendix 5:
2007-08 ROII Enrollment Agreement
(emphasis added)

Trial Exhibit 2227

CP 8893-8902

2007 - 2008

**Building Industry Association of Washington
Return On Industrial Insurance
(R.O.I.I.) Program
Enrollment
Instructions**

Easy to follow, step by step instructions

Fill out

**Application forms 1, 2, & 3
(with original signatures)**

*A separate application must be submitted for
each L&I account applying for participation.*

Include

Enrollment fee and Application forms

*Enrollment fees are based on standard premiums paid from
July 1, 2004 through June 30, 2005.*

*The Enrollment fee is 1.5% of your L&I premium or
\$150 - whichever is greater.*



**DO NOT INCLUDE MORE THAN THE \$150 MINIMUM R.O.I.I. ENROLLMENT FEE AT THIS TIME.
BIAW WILL INVOICE YOUR COMPANY FOR ANY BALANCE DUE.
MAKE YOUR CHECK PAYABLE TO: BIAW MEMBER SERVICES**

Send to

BIAW - ROII Program

P.O. Box 1909

Olympia, WA 98507

(We cannot accept any faxed applications.)

Questions

Call 1-800-228-4229

Ask for Lara Hastings,

Cindy Martin or Jennifer Wright

Deadline

**Applications must be received by
Friday, April 27, 2007**

2007 - 2008

Building Industry Association of Washington
Return On Industrial Insurance (R.O.I.I.) Program
Enrollment Application
Form I

Company Information

Company Name _____

Mailing Address _____

☐ Check here if new address

City, State, Zip _____

Phone Numbers _____

Fax Number _____

e-mail address _____

Business type: ☐ Sole Proprietorship ☐ Partnership ☐ Corporation ☐ LLC ☐ LLP ☐ Other: _____

Account Information

L&I Account ID# _____

Previous L&I Account ID# (if within past 3 years) Is previous L&I # 50% common ownership? ☐ YES ☐ NO

Federal ID# _____

UBI# _____

Do you report under more than one L&I account ID#? ☐ YES ☐ NO
(The answer is no if you only file one quarterly premium report to L&I)

If you answered yes, are the first 6-digits of the account ID# the same as the account ID# listed above? ☐ YES ☐ NO

If you answered yes to both questions, you must submit a separate application for each L&I account ID# that is construction related. Failure to enroll all construction related subsidiary accounts will result in denial by L&I. (See Program Information - Requirements L&I.)

Local Home Builders Association Information

To be approved into the R.O.I.I. program, you must be a member of your local home builders association (affiliated with BIAW). Please check one:

- ☐ I am a current member of the: _____
Name of your local home builders association (list only one)
- ☐ I have applied to be a member of the: _____
Name of your local home builders association (list only one)
- ☐ Please send me information on how to become a member of my local home builders association.

Personnel Information

Administrative contact person (at your company) _____

Claims contact person (at your company) _____

L&I Release Information

Signing this release gives BIAW permission to contact anyone at the above listed company via mail, phone, and fax for any BIAW related matters. To the Department of Labor and Industries: You are hereby authorized to release account information such as, but not limited to, premiums, claim history and risk classification on the above account to the Building Industry Association of Washington.

X

Signature _____

Title _____

Date _____

2007-2008

Building Industry Association of Washington
Return On Industrial Insurance (R.O.I.I.) Program
Application for Group Membership
Department of Labor and Industries
Form 2

Mail to Association: Building Industry Association of Washington
P.O. Box 1909
Olympia, WA 98507



Company Name: _____ UBI#: _____

L&I Account ID#: _____

Retro ID: 025

Plan: B

Maximum Premium Ratio: 1.4

Coverage Year Beginning: July 1, 2007

Employer, If you have more than one Department of L&I account, each UBI number or Account ID must be specified. This agreement covers all related businesses/accounts. If any of these related businesses/accounts have operations that are substantially dissimilar in nature, you may exclude them from this agreement but must do so in writing.

Applications received in the Department of L&I headquarters by the 15th day of the month preceeding the start of any quarter within the coverage period will be enrolled for that portion of the coverage year.

As a member of this association, this employer applies for enrollment in the Group Retrospective Rating Plan sponsored by the association.

By signing this document, the employer agrees with the following items:

1. Continued enrollment with this association for future coverage periods will be assumed unless written notification is received to the contrary from either the group or the employer.
2. The Department of Labor & Industries will give data and information about the employer's workers' compensation insurance account to the association or their designee.
3. The association may represent the employer in their workers' compensation insurance matters.
4. The employer is bound by the terms of the agreement between the Association, the Department of Labor & Industries and the Washington Administrative Codes in effect for the coverage period.
5. All retrospective premium adjustments that may be earned by the employer will be given to the Association. The distribution to or collection from the individual group members will be done by the association.
6. The employer will actively participate in the Association's safety endeavors.

These sanctions are in effect immediately. They will remain in effect through the term of any agreement signed by the Association for the employer.

Your signature on this document is required by the Department of Labor and Industries to participate in this group plan. Other contracts signed as a condition to your participation are outside the scope of the Department's authority and responsibility. We neither approve nor disapprove of any language or provision contained in other contracts.

NOTE: Return this application directly to the above Association. **DO NOT MAIL TO L&I.**

X

Signature (Owner/Officer)

Title

Type or print name

Date

2007-2008

Building Industry Association of Washington
Return On Industrial Insurance (R.O.I.I.) Program
BLAW Group Retrospective Rating Program Agreement
Form 3

PLEASE COMPLETE THE FOLLOWING:

X

Signature (Owner/Officer)

Date

Print or Type Name

Title

Company Name

L & I Account ID #

THIS AGREEMENT is made and entered on the date listed above and between the BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, a Washington nonprofit corporation (hereinafter "BLAW"), and the above listed company, a member in good standing of BLAW (the "Member"), and a member in good standing of the local home building association affiliated with BLAW.

RECITALS:

A. BLAW has entered into a "Group Retrospective Rating Agreement" (the "DLI Agreement") with the Washington State Department of Labor & Industries ("DLI") pursuant to Chapter 51.18 RCW. Under the DLI Agreement, DLI will rate the industrial insurance premiums of participating members of the Association as a group (the "Participants") during the coverage period described in this Agreement (the "Plan").

B. Member wishes to be a Participant in the Plan.

Therefore, in consideration of the mutual promises and covenants contained in this Agreement, the parties hereto agree as follows:

1. **Definitions.** The following definitions apply to this Agreement:

(a) "Coverage Period" means the period commencing July 1, 2007 and ending June 30, 2008, provided, however, that if the Member becomes a participant in the plan after July 1, 2007, then the coverage period commences on the first day of the first calendar quarter beginning after the date this agreement is executed by BLAW, and ends on June 30, 2008.

(b) "Premium" means the industrial insurance premiums the Member and other Participants pay to DLI for workers' compensation coverage (not including penalties or security deposit) during the Coverage Period. DLI calculates the Member's Premium using the "Assigned Industrial Insurance Rate" described in DLI's rate notice to the Member.

(c) "Premium Returns" means DLI's payment to BLAW of dividends and the contingent retrospective return of a portion of Premiums paid by Participants during the Coverage Period, pursuant to the DLI Agreement and DLI regulations.

(d) "Penalties" means sums which, upon demand by DLI, are payable by Participants through BLAW to DLI with respect to the loss experience of the Plan during the Coverage Period. The limit of the Member's obligation for Penalties under the Plan is described in paragraph 6 of this Agreement.

2. **The Plan.** Under the terms of the DLI Agreement, BLAW will be entitled to receive any Premium Returns from DLI with respect to the Coverage Period on behalf of the Member and other Participants. Alternatively, DLI may demand Penalties from the Member and other Participants with respect to the Coverage Period. BLAW has selected "Plan B" under DLI regulations, which limits Participants' additional liability to DLI for Penalties to forty percent (40%) of Premiums paid by each Participant during the Coverage Period (see paragraph 6 for other financial obligations of the Member).

3. **Plan Administration.** BLAW will administer the Plan on behalf of the Member and other Participants. BLAW will provide the Member enrollment procedures, claims management assistance, and administration of the Plan. BLAW may delegate these administrative duties to a subsidiary controlled by BLAW. The "Washington Builders Benefits Trust" (hereinafter "the Trust") will receive, on behalf of Participants, all Premium Returns paid by DLI pursuant to this Agreement, and hold some or all of such Premium Return until the expiration of the period DLI may adjust such Premium Return or claim Penalties with respect to the Coverage Period. The Trust is comprised of seven trustees appointed by the president of BLAW from among the BLAW general membership. All actions and decisions by the Trust regarding the disposition of the Premium Returns, including establishing reserves, investment of funds, the timing and amount of distributions or payments to Participants, and expenditures from the Trust for administrative costs and expenses of the Plan shall be within the sole discretion of the Trust. The Trust, in its discretion, may hire attorneys, consultants, or accountants necessary to accomplish its obligations and may pay from the Trust such compensation for such services as it deems reasonable and proper.

4. **Obligations and Agreements of the Member.**

(a) The Member agrees to pay to BLAW or its subsidiary a Member Enrollment Fee equal to one and one-half percent (1.5%) of the Member's Premium for the period of July 1, 2004 through June 30, 2005, or One Hundred Fifty and no/100 Dollars (\$150.00), whichever amount is greater. The Member Enrollment Fee is payable on submission of this Agreement to BLAW. If Member becomes a participant in the plan after July 1, 2007 then the fee will be prorated based on the percentage of the Member's coverage period bears to the period from July 1, 2007 through June 30, 2008, however, that in no event shall the fee be less than \$150.00.

(b) By execution of this Agreement, the Member absolutely assigns to the Trust all Premium Returns that may be payable by DLI on behalf of the Member, to protect the Member and BLAW from Penalties and from other future obligations to DLI with respect to industrial insurance for the Coverage Period and any other period. The Member further authorizes the Trustees to pay from the Premium Returns the balance of the Enrollment Fee and such costs and expenses for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer ten percent (10%) of the Participants' Premium Returns applicable to the Coverage Period to local associations and 10% to BLAW for marketing and promotion of the Plan.

(c) The Member agrees to complete and file with DLI such documents as DLI may require.

(d) The Member hereby authorizes DLI to release all present and future workers' compensation insurance data regarding the Member and its account to BLAW. "Worker's compensation insurance data" for purposes of this Agreement includes the Member's claims history, Premium payment history, losses, statistics, experience modification factors, and other Industrial Insurance data. This authorization shall remain in effect throughout the entire period of Member's obligation under the Plan and any other plans in which the Member is a Participant and may not be withdrawn during such period.



3a

BIAW Group Retrospective Rating Program Agreement

Form 3

(e) The Member shall be bound by and comply with all rules and regulations issued by DLI, by the terms of the DLI Agreement, by such rules and regulations as may from time to time be issued by the BIAW or the Trust, and by the decisions of BIAW or the Trust as to any aspect of the Plan.

(f) The Member shall participate in loss prevention control efforts, and cooperate with BIAW or its subsidiary in safety programs and other efforts to reduce industrial insurance claims.

(g) The Member shall maintain in good standing one or more accounts with DLI, and make timely payment to DLI of quarterly Premiums based upon the Member's assigned risk classification(s) and individual experience rating, and pay all Premiums, Penalties or other assessments arising from the Coverage Period.

(h) The Member shall remain a member in good standing in BIAW and the Member's local association for the period the Member has any obligation to BIAW under this Agreement.

5. Acknowledgments by Member. The Member represents and acknowledges the following:

(a) Any computerized reports prepared by DLI which establish the allocation of Premium credits and/or Penalties shall represent the determinative basis for establishing amounts due to or from the Member and that this procedure is nondiscriminatory.

(b) DLI is authorized to pay all retrospective Premium Returns arising from Member's payment of Premiums during the Coverage Period to BIAW or the Trust.

(c) The Trust is vested with the sole authority to receive the Premium Return from BIAW or DLI, to hold some or all of such Premium Return until the expiration of the period DLI may adjust such Premium Return or claim Penalties with respect to the Coverage Period, and distribute all Premium Returns to Participants, and all decisions of the Trust with regard to reserves, investments, expenditures, and disbursements shall be absolute and binding upon Member.

6. Distribution of Premium Return. THE RETROSPECTIVE PREMIUM RETURN IS DETERMINED BY DLI AND IS BASED UPON PREMIUM SIZE, CLAIMS COSTS, AND RELATED FACTORS AND THEREFORE IS NOT GUARANTEED. Any Premium Returns payable to BIAW by DLI under the DLI Agreement shall be held in trust by the Trust for Participants including the Member and shall be subject to the exclusive management and control of the Trust. The Member shall have no legal right or entitlement to any portion of said sums or any interest or benefit accruing from the investment of any such sums, until such time as the Trust, in its sole discretion, declares a distribution of any portion of the Premium Return to Participants. The Member may not assign or pledge any portion of such sums and they may not be attached voluntarily or by operation of law by any creditor of the Member.

The timing and amount of any distribution of all or any part of the Premium Return and any earnings on such Premium Return shall be determined by the Trust in its sole and absolute discretion, based upon such reasonable distribution system as may now or hereafter be adopted by the Trust. Any decision by the Trust to either pay to Participants all or any portion of any Premium Return or to accrue or invest any or all of the Premium Return shall not be subject to challenge or modification by the Member or any other Participants or any assignee or creditor thereof.

7. Default by Member. If the Member is in default of any of the Member's obligations under this Agreement, including termination of membership in BIAW or the Members' local association, or failure to remain a member in good standing in BIAW or the Member's local association, or expulsion according to the bylaws of BIAW or the Members' local association (hereinafter "Defaulting Member"), the Defaulting Member shall from and after the date of such default be deemed to have forfeited any and all rights to any sums held by the Trust. Any Premium Return held, invested or accrued by the Trust pursuant to the discretion granted the Trust and any interest or profit associated with such Premium Return shall not be subject to any claim by the Defaulting Member or any creditor or assignee thereof. Any forfeited sums shall be distributed or held for the benefit of the Participants, according to the discretion of the Trust.

8. Payment of Penalties, Limits, or Member Liability.

(a) Payment of all Penalties and additional Premium with respect to the Coverage Period will be on a pro-rata basis between the Participants, including the Member. The Member's liability for such penalties shall not exceed: (a) the sum of any money previously returned by the Trust to the Member pursuant to this Agreement, plus, (b) an amount equal to forty percent (40%) of Premium paid by Member during the Coverage Period.

(b) DLI makes three (3) annual retrospective adjustments to the Premium Return and may demand Penalties for up to three (3) years beyond the Coverage Period. As a result, the Member's liability to BIAW or the Trust pursuant to the provisions of this Agreement will extend beyond the Coverage Period and shall continue until all Penalties and additional Premiums due (if any) have been fully paid. The Member's liability under this Agreement shall not be extinguished by the Member's withdrawal, expulsion or membership termination with BIAW or the Members' local association.

(c) The provisions of this Agreement do not limit DLI's legal right to collect from the Member any defaulted Premiums, penalties or assessments arising from coverage provided by DLI. If DLI withholds any of such amounts owed by the Member from any aggregate retrospective Premium Return paid to BIAW, such amounts shall be deemed an obligation of the Member to BIAW and, upon demand by BIAW to the Member, the Member shall immediately pay the sum to BIAW in full.

(d) The Member shall, upon demand by BIAW or the Trust, remit any sums owing under the terms of this Agreement. In the event the Member fails or refuses to pay any sum claimed by the Trust to be owing, that sum shall bear interest at a rate of eighteen percent (18%) per annum until the sum is collected.

(e) Should BIAW determine that the Member has not fully or properly reported in appropriate risk classifications, has understated hours worked by the Member's employees, or has based Premium payments on any methodology which causes payments to be understated, including but not limited to estimates of hours or piecework hours, then in such event, BIAW at its option may collect from the Member the difference between the Member's retrospective premium and the Premium actually paid by the Member. For purposes of this paragraph "retrospective premium" shall be as calculated by DLI.

9. Attorneys' Fees. In the event BIAW or the Trust is required to hire legal counsel to enforce the Member's obligations under this Agreement, the Member agrees to pay all legal fees and cost incurred by the Trust or BIAW in any action or proceeding.

10. Limitations of Liability and Indemnification. The Member hereby releases and agrees to indemnify and hold BIAW, its subsidiary, the Trust, and all of the members of the Trust harmless from any and all liability for any decision which may now or hereafter be made by BIAW, its subsidiary, or the Trust with regard to the Plan, any Premium Returns (including interest, principal and profit), the payment of any such sums or the investment of any such sums.

11. Acceptance in Plan. The Member acknowledges that DLI will accept BIAW's participation only if BIAW complies with statutory and regulatory requirements, and that the Member's participation is also subject to approval by DLI and BIAW. This Agreement will become effective only upon approval of the Plan and the Member's participation. This Agreement shall be binding upon the Member, its successors and assignees.

IN WITNESS WHEREOF the parties hereto have executed this Agreement the day and date first above written.

Your signature required at top of page 3a.

3b

2007 - 2008

Building Industry Association of Washington
Return On Industrial Insurance (R.O.I.I.) Program
Program Information

How The Program Works



Member companies continue to remit their quarterly premiums directly to the Washington State Department of Labor and Industries during the plan year. Participation in the R.O.I.I. program neither reduces nor increases a members' industrial insurance rates. The R.O.I.I. plan year begins July 1 and ends June 30. One year following the close of the plan year, L&I calculates the first of three retrospective refunds. If the R.O.I.I. group's premiums exceed its developed losses, L&I returns the excess premium money to the group. If developed losses exceed premiums, group members can be assessed additional premiums. Due to R.O.I.I.'s strict enrollment criteria and its safety and claims assistance programs, the group's premiums have always exceeded its losses, resulting in a refund every year since the program began in 1982.

Notification of Application Status

Companies that apply by April 27th will be notified in May 2007 if the application *does not* meet BIAW loss and history program requirements and given the opportunity to appeal. Companies that *do* meet the BIAW program requirements will receive an acceptance and claims information packet in June 2007. Any company subsequently denied by L&I will be provided with additional notification and appeal rights.

Companies that apply after April 27th will be notified in writing if BIAW or L&I denies the application. There will not be an opportunity to appeal this denial. Companies that are approved by BIAW and L&I will receive an acceptance and claims packet.

Any companies denied enrollment in the plan year, will be refunded any enrollment fees paid for the plan year.

Program Requirements: BIAW

- Show a positive loss ratio of developed losses versus premiums based on criteria developed by the R.O.I.I. program Trustees.
- Have a minimum of one year (July through June) of obtainable industrial insurance account history in Washington State.
- Current membership in your local home builders association affiliated with BIAW

For questions on the BIAW group program, please contact our BIAW Retro Enrollment Staff
Renewing Companies Contact:

Jennifer Wright or Cindy Martin 1-800-228-4229

New Companies Contact:

Lara Hastings, Cindy Martin or Jennifer Wright 1-800-228-4229

Program Requirements: L&I

- Have an active industrial insurance account with L&I.
- Industrial insurance account must be in good standing (paid in full) at the time of enrollment — including sub-accounts.
- Be a current BIAW association member (see Program Requirements – BIAW).
- Must separately enroll all sub-accounts that are substantially the same nature of business.
- The primary nature of business for applying account(s) must be "construction and related services."

For verification of meeting this criteria for the BIAW group, please refer to the attached list of accepted risk classifications or contact your Retro Coordinator at L&I listed below:

L&I Retro Coordinators

Rose Oram (360) 902-4843; e-mail: oram235@lni.wa.gov

Kristeen Johanson (360) 902-5448; e-mail: leak235@lni.wa.gov

Your company must *primarily* report under one or more of the accepted risk classifications to be eligible.

**Enrollment and Refund Timeline and
Accepted Risk Classifications on reverse side**

2007 - 2008

Building Industry Association of Washington
Return On Industrial Insurance (R.O.I.I.) Program
Program Information

Enrollment and Refund Timelines

BLAW Annual R.O.I.I. Enrollment Period

Sign-up Period February – April 27, 2007

R.O.I.I. Plan Year

Coverage Period July 1, 2007 – June 30, 2008

Refund Adjustments

First Adjustment Year July 2009

One year after the Plan Year ends the program will receive and distribute the first of three adjustments

Second Adjustment Year July 2010

One year after the first adjustment the program will receive and distribute the second of three adjustments

Third Adjustment Year July 2011

One year after the second adjustment the program will receive and distribute the third and final of three adjustments

Construction and Related Services

If your company qualifies, all of your industrial insurance premiums during the plan year will be covered under the R.O.I.I. program.

Applies to establishments engaged in all aspects of construction related services and activities as a primary business undertaking. The following risk classifications (and sub classifications) include operations applicable to Construction and Related Services:

0101 Excavation & Grading N.O.C.	0508 Struct. Steel Erec. - Towers, Tanks & Cranes	0551 Wallboard Taping - Undiscounted Rate
0103 Drilling & Geophysical Exploration N.O.C.	0509 Overhead Power & Transmssion Line Const.	0601 Electrical Wiring: Buildings & Structures
0104 Dredging N.O.C.	0510 Wood Frame Building Construction	0602 Elevator Installation, Service & Repair
0105 Fence Erection N.O.C.	0511 Glass Installation: Buildings	0603 Machinery Installation, Service & Repair
0107 Undergrd. Utility Line Const. & Pipelaying N.O.C.	0512 Insulation Inst. & Asbestos Abatement Work	0606 Vending Machine Inst., Service & Repair
0108 Sewer & Septic System Construction	0513 Interior Finish Carpentry	0608 Telephone & Electrical Alarm System Inst.
0112 Sand & Gravel Production including Dealers	0514 Garage Door Installation	0701 Dam Construction
0201 Bridge, Bulkhead & Tunnel Construction	0516 Carpentry N.O.C.	0901 Shipbuilding or Repair N.O.C.
0202 Pile Driving with Water Hazard	0517 Factory Built Home Set-up by Cont./Mfg.	1303 Tele. Co. - All Other Employees N.O.C.
0210 Asphalt Paving - Streets & Roads	0518 Non Wood Frame Building Construction	1305 TV Cable Co. - All Other Employees N.O.C.
0212 Asphalt Paving N.O.C.	0519 Sheet Metal Siding, Gutter & Downspout Inst.	1507 Waterworks Operations, Repair & Maint.
0214 Concrete Work - Streets & Roads	0521 Painting: Buildings - Interior Work	1702 Underground Mines
0217 Concrete Work - Foundations & Sidewalks	0524 Drywall Installation (Discounted)	1703 Surface Mines
0219 Guardrails, Street Signs & Traffic Lights Inst.	0526 Drywall Taping (Discounted)	1704 Quarries
0301 Landscape Construction & Renovation	0527 Drywall Prime/Texture (Discounted)	2009 Lumber Yards & Building Material Dealers
0302 Masonry Construction	0528 Drywall Stocking (Discounted)	2907 Cabinet & Countertop Manufacturing - Wood
0303 Plastering, Stuccoing & Lathing: Buildings	0529 Drywall Scraping (Discounted)	2908 Factory Built Housing Manufacturing
0306 Plumbing	0530 Drywall Installation	3101 Redi-mix Concrete Dealers
0307 HVAC Systems - Installation, Svc. & Repair	0531 Drywall Taping	3105 Concrete Products Manufacturing
0308 Lawn Care Maintenance	0532 Drywall Prime/Texture	3415 Factory Built Housing Dealers
0403 Sign Erection	0533 Drywall Stocking	3506 Mobile Crane & Hoisting Services
0502 Floor Covering Installation	0534 Drywall Scraping	4900 Const. Project or Site Superintendent/Mgr.
0504 Painting: Building & Structures - Ext. Work	0540 Wallboard Installation - Discounted Rate	4901 Consulting Engineers & Architectural Svcs.
0506 Building Moving/Wrecking	0541 Wallboard Taping - Discounted Rate	4910 Property & Building Management Services
0507 Roof Work - Construction & Repair	0550 Wallboard Installation - Undiscounted Rate	5208 Iron Works - Shop

Sub Classifications:

0607-16 TV Antenna or Satellite Dish: Inst., Removal, Svc. and/or Repair	1108-03 Flat Glass Merchants - No Tempering	4903-07 Boiler Inspecting N.O.C.
0607-17A Safe, Vault, Mail Boxes or Safe Deposit Boxes: Inst., Removal, Svc. and/or Repair	1108-05 Combined Auto & Flat Glass Merchants - No Tempering	4903-08 Elevator Inspecting
0607-17B Lock Sets and/or Dead Bolt Locks: New Installation	1501-09 Military Base Maintenance N.O.C.	4903-10 Inspection of Buildings
0607-18 Window Door Blinds, Curtains, Shades & Drapes: Installation	2903-08 Wood Door, Jamb, Window, Sash, Stair, Molding & Misc. Woodwork: Mfg., Prehanging or Assembly	5206-79 Permanent Yard or Shop Operations; Construction or Erection Contractor
0607-19 Advertising or Merchandise Display: Set-up or Removal within Buildings by Non-store Employees	2903-21 Wood Truss: Manufacturing	6601-04 Security Guards at Construction Sites
	2903-28 Wood Boat: Mfg., Repair or Refinish	
	3402-40 Welding or Cutting N.O.C.	
	4903-06 Marine Appraising	

A company may be eligible to participate in the group by exception if they are doing a construction related activity, that is not assigned to a risk classification listed above. Please contact Lara Hastings at 1-800-228-4229 at BLAW for more information.

Appendix 6:

Explanation of Flow of Funds
(Exhibit 1 to September 15, 2009 Declaration of Sou Chiam)

CP 1599-1610

Note: The declaration to which this exhibit was originally attached appears at CP 1585-1598.

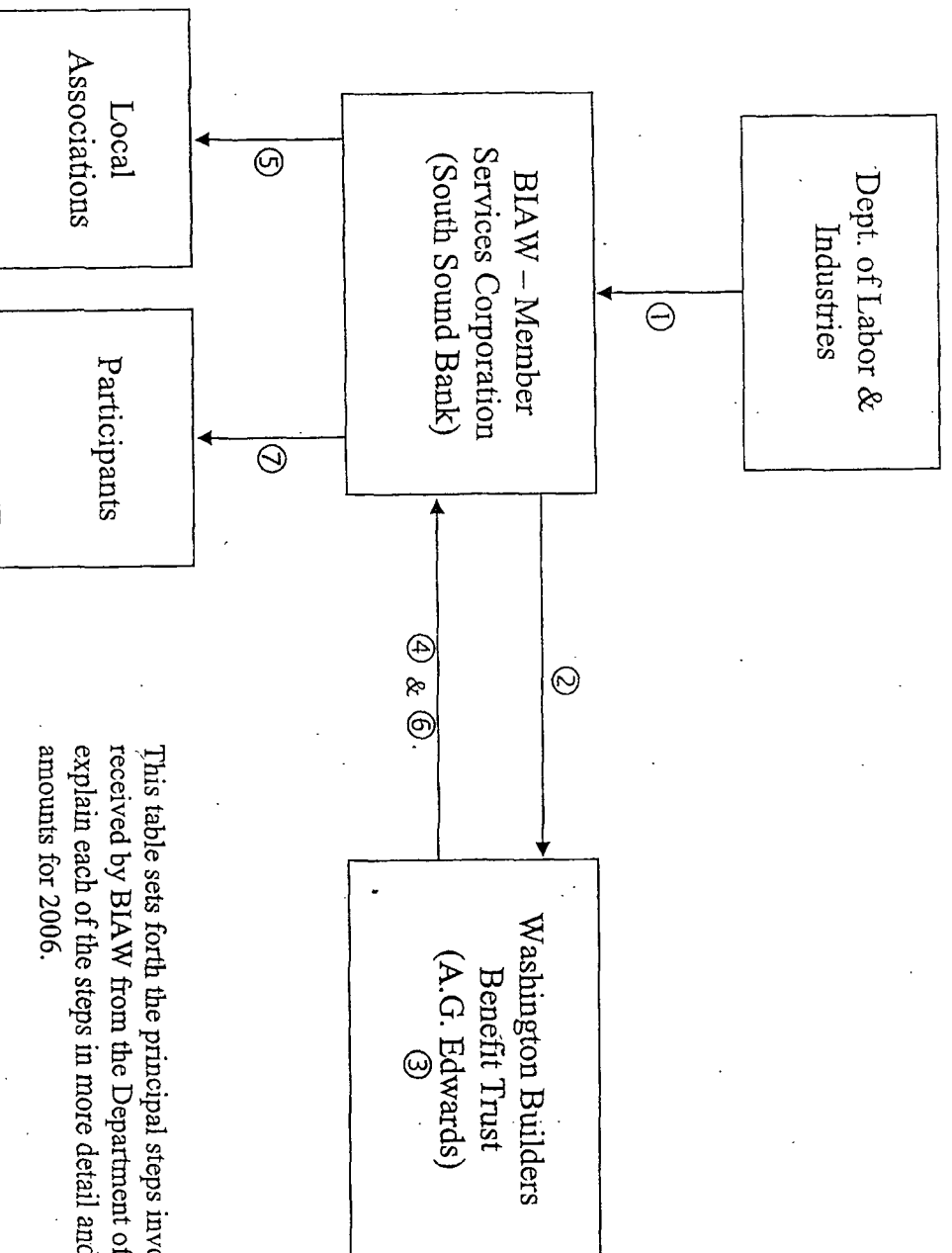
Schematic Explanation of Flow of Funds (Chiam Dec. Ex. 1)

(DFRIII TAB 2)

IN RE: WASHINGTON BUILDERS BENEFIT TRUST
NO. 08-2-01674-6
EXPLANATION OF FLOW OF FUNDS

Exhibit 1

OVERVIEW OF THE FLOW OF FUNDS



This table sets forth the principal steps involved in the flow of funds related to refunds received by BLAW from the Department of Labor & Industries. Subsequent pages explain each of the steps in more detail and provide, by way of example, the relevant amounts for 2006.

THE RELEVANT ENTITIES

Washington Department of Labor & Industries: Pursuant to RCW 51.18, the Department of Labor & Industries contracts with industry associations that sponsor retrospective rating groups, agreeing to pay refunds to those sponsoring organizations.

Washington Department of Labor & Industries (BLAW): Pursuant to RCW 51.18.020-040, WAC 296-17-90421 and WAC 296-17-90445, BLAW sponsors a retrospective rating program, which it calls the Return on Industrial Insurance (ROI) program. As industry associations that sponsor retrospective rating groups, BLAW enters into contracts each year with the Department of Labor & Industries to receive the payments from the Department.

Building Industry Association of Washington (BLAW): Pursuant to RCW 51.18.020-040, WAC 296-17-90421 and WAC 296-17-90445, BLAW sponsors a retrospective rating program, which it calls the Return on Industrial Insurance (ROI) program. As industry associations that sponsor retrospective rating groups, BLAW enters into contracts each year with the Department of Labor & Industries to receive the payments from the Department.

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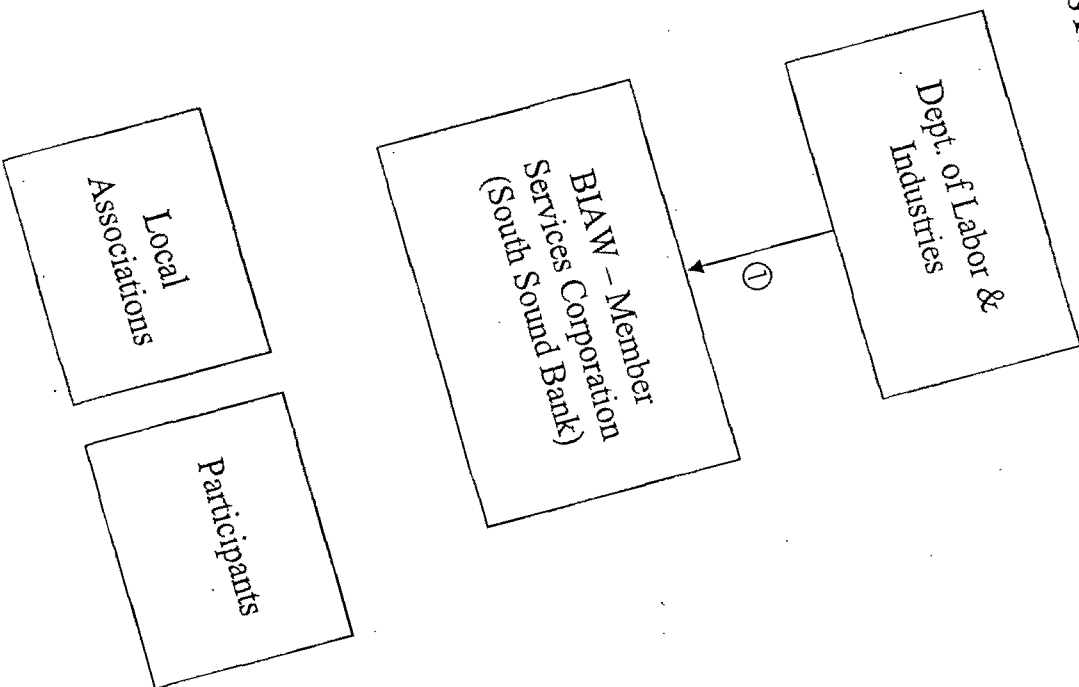
TIMING OF PAYMENTS

The Department of Labor & Industries makes payments to (or requests reimbursements from) BLAW with regard to a particular plan year over the course of three years. Plan years run from July 1 to June 30. The first and largest payment, the initial estimate of the refunds owed, is made in April or May following the close of the plan year. Additional payments are made to BLAW, or requested from BLAW, in April or May of the next two years, as the Department fine tunes its determination of the correct amount of a refund for a plan year. (Smaller, interim adjustments, may also be made at other times of year.) For example, on April 28, 2006, the Department transferred \$41,880,963 to BLAW, which included \$37,352,173 for the first adjustment for the 2004-05 plan year, \$4,264,752 for the second adjustment for the 2003-04 plan year, and \$264,038 as the third and final adjustment for the 2002-03 plan year.

Because the Department of Labor & Industries makes its determination of the proper amount of refunds over the course of three years, and because the Department may request BLAW to return, in the second and third year, amounts paid in the first year, it is not prudent to pay participants everything received from the Department during April and May. The following year, WBBT will distribute an additional 20% of the Department received from the Department during April and May. In general, in July of each year, WBBT will distribute the remaining adjustment received from the Department during the year of the first adjustment. Instead, amounts received from the Department transferred for the second adjustment for the 2003-04 plan year, and \$264,038 as the third and final adjustment for the 2002-03 plan year, after the third and final adjustment is received from the Department, WBBT will distribute the remaining total of the first and second adjustments (i.e., 90% of the amount then estimated to be due, minus the amount paid the prior year). In July of the following year, after the third and final adjustment is received from the Department, WBBT will distribute the remaining amount due.

Article IV, Section 11 of the WBBT Declaration of Trust and Section 4(b) of the enrollment agreements provide that BLAW is entitled to receive 10%, and the local associations collectively are entitled to receive an additional 10%, of the refunds paid by the Department of Labor & Industries. BLAW has assigned the right to receive its share to MSC. MSC and the local associations receive these payments according to the same 70/20/10 schedule that participants receive their share of refunds.

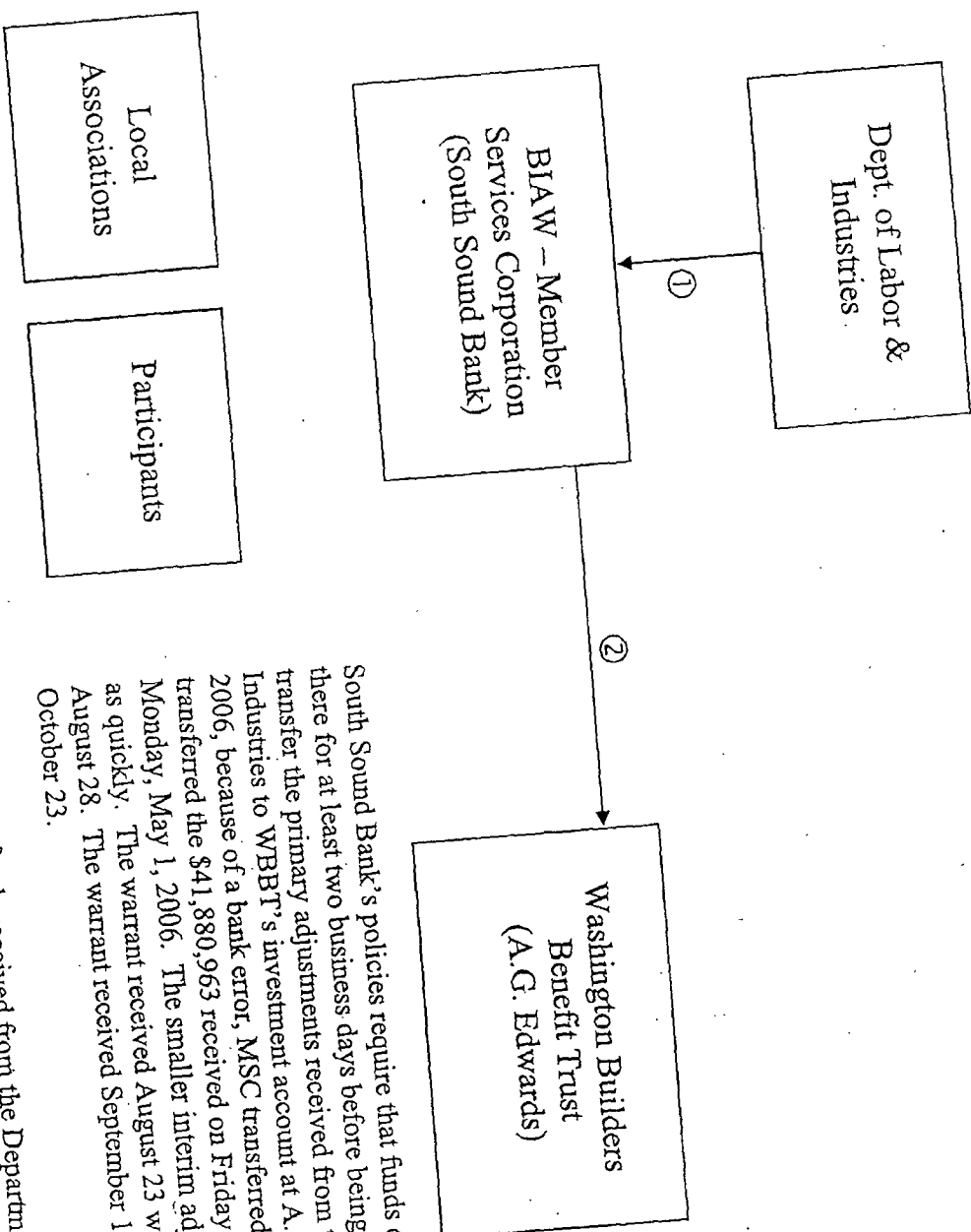
STEP 1: PAYMENT OF ADJUSTMENTS BY DEPARTMENT OF LABOR & INDUSTRIES



Washington Builders
Benefit Trust
(A.G. Edwards)

Each year, in late April or early May, the Department of Labor & Industries issues a warrant to BLAW, as sponsor of the ROII plan. When the Labor & Industries warrants arrive, they are deposited in a MSC money market account at South Sound Bank. For example, on April 28, 2006, the Department transferred \$41,880,963, which included \$37,352,173 for the first adjustment for the 2004-05 plan year, \$4,264,752 for the second adjustment for the 2003-04 plan year, and \$264,038 as the third and final adjustment to BLAW. In some years, the Department also transfers smaller interim adjustments to BLAW. The Department made three such payments in 2006: \$286,154 for the 2002-03 plan year on August 23, \$445,956 for the 2002-03 plan year on September 18, and \$93 for the 2003-04 plan year, also on August 23, and \$445,956 for the 2002-03 plan year on September 18.

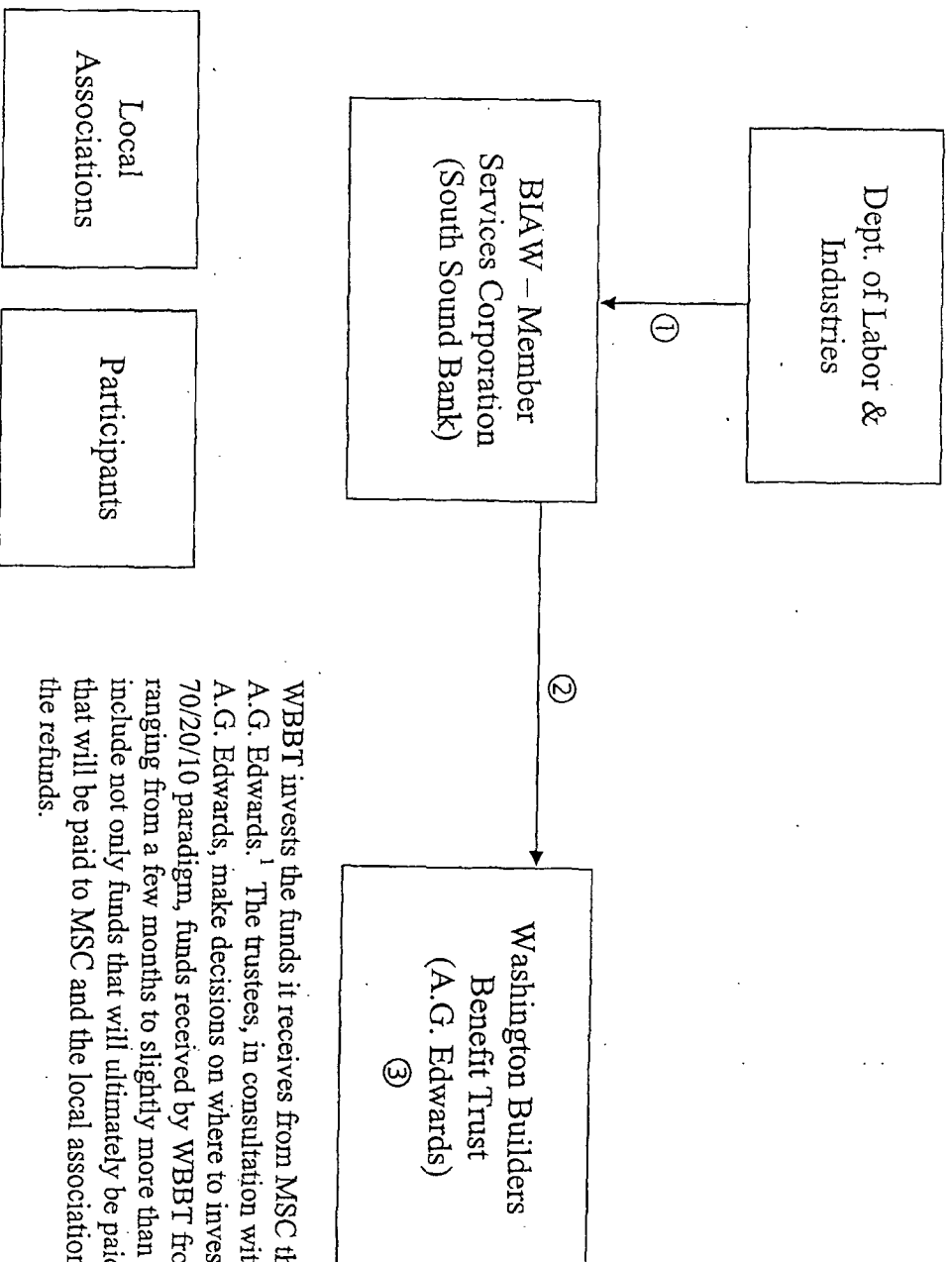
STEP 2: TRANSFER OF ADJUSTMENTS TO WBBT



South Sound Bank's policies require that funds deposited in MSC's account remain there for at least two business days before being transferred out. MSC endeavors to transfer the primary adjustments received from the Department of Labor & Industries to WBBT's investment account at A.G. Edwards as soon as it is able. In 2006, because of a bank error, MSC transferred the money even sooner. It transferred the \$41,880,963 received on Friday, April 28, 2006 to WBBT on Monday, May 1, 2006. The smaller interim adjustments are typically not transferred as quickly. The warrant received August 23 was transferred to WBBT on August 28. The warrant received September 18 was transferred to WBBT on October 23.

Because the funds received from the Department are held in a money market account before being transferred to WBBT, MSC earns interest on those funds while it holds them. For example, MSC earned \$14,424 between April 28 and May 1, 2006, an additional \$155 between August 23 and August 28, 2006 and an additional \$1,695 between September 18 and October 23, 2006.

STEP 3: FUNDS ARE INVESTED BY WBBT

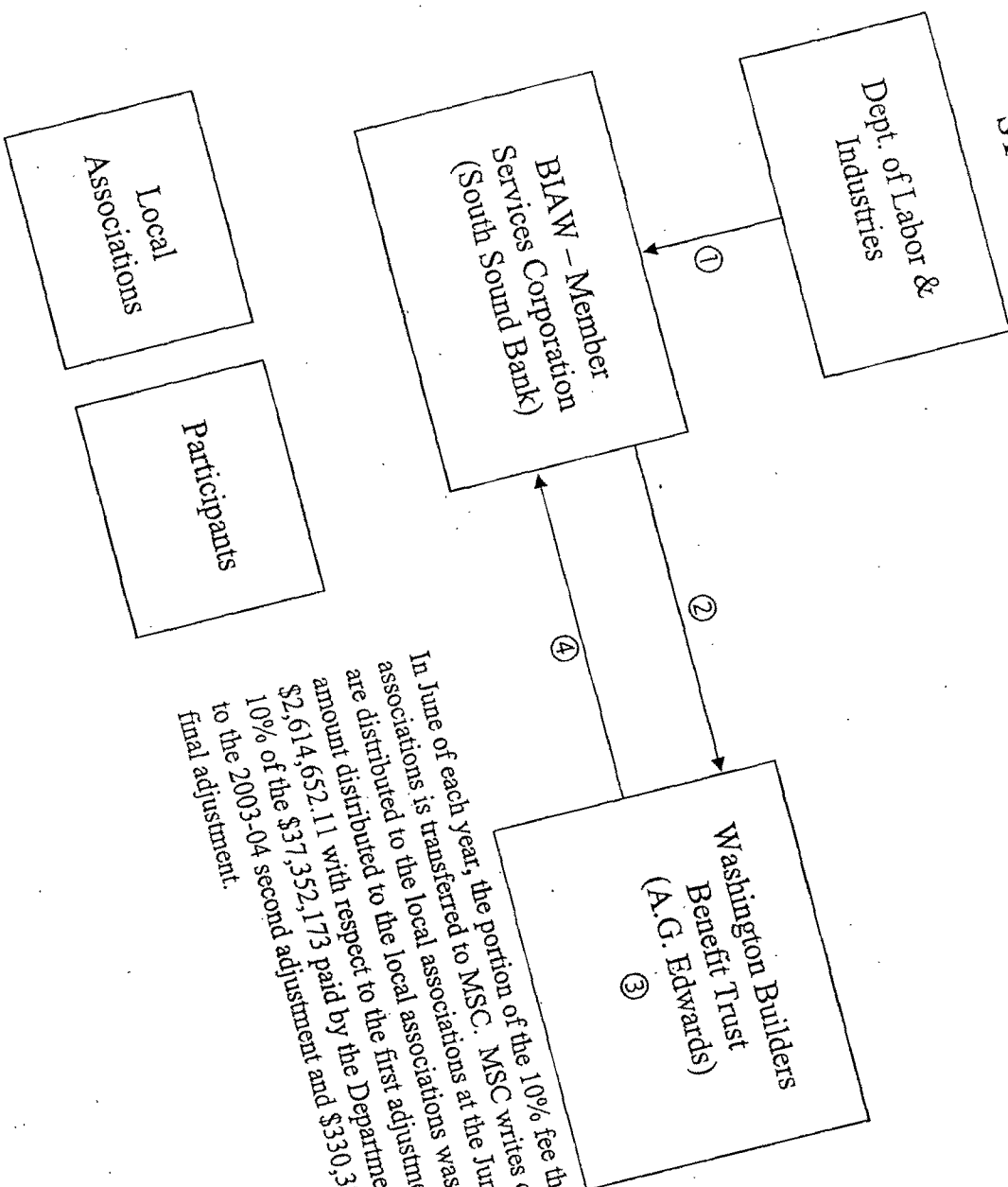


WBBT invests the funds it receives from MSC through investment accounts at A.G. Edwards.¹ The trustees, in consultation with an investment advisor at A.G. Edwards, make decisions on where to invest the funds. Pursuant to the 70/20/10 paradigm, funds received by WBBT from MSC are invested for periods ranging from a few months to slightly more than two years. The funds invested include not only funds that will ultimately be paid to the participants, but also funds that will be paid to MSC and the local associations pursuant to their rights to 10% of the refunds.

All realized investment earnings that are earned while the funds are held by WBBT will eventually be paid to the participants. The realized investment earnings paid to the participants include earnings on the 10% fees owing to MSC and the local associations.

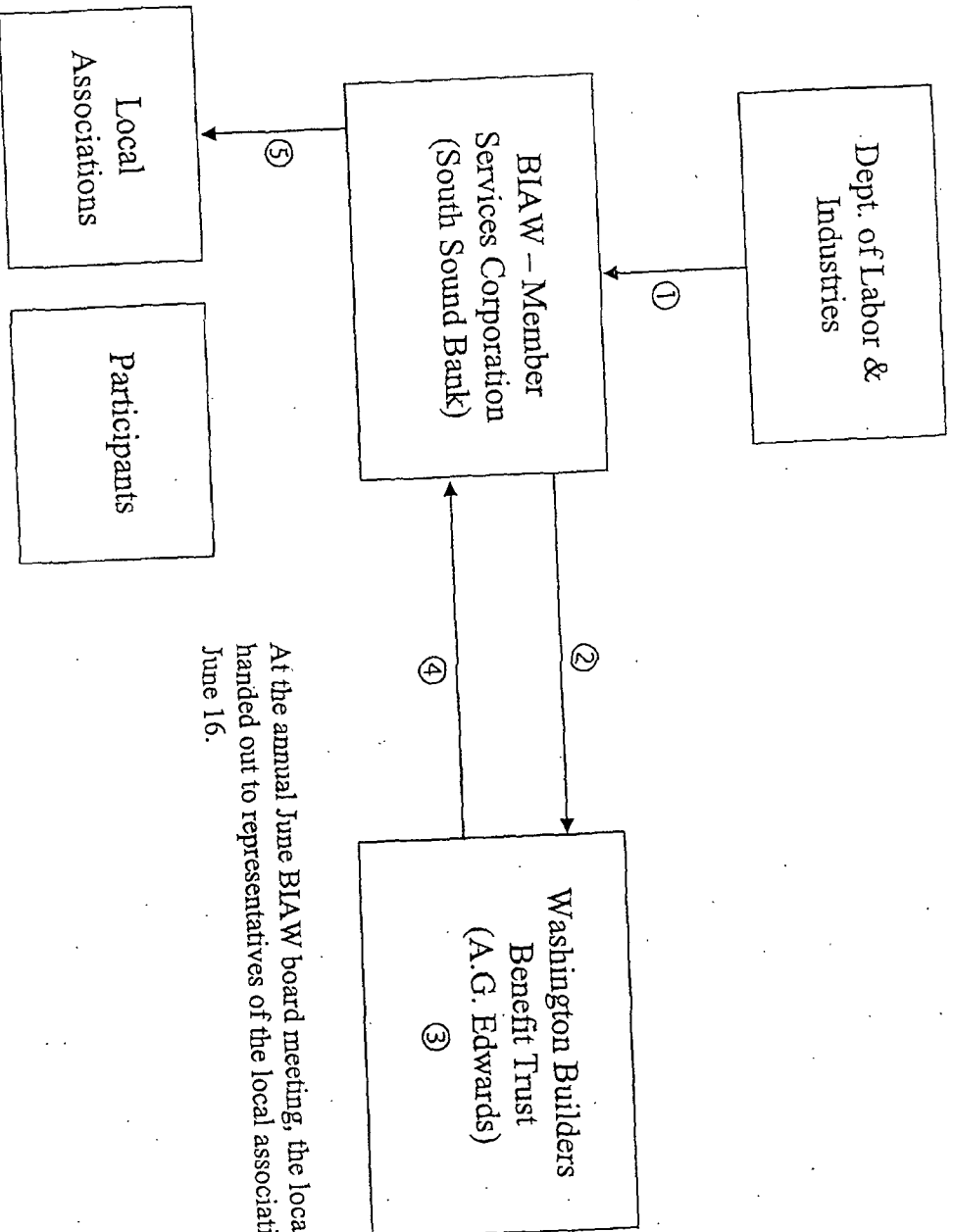
¹ A.G. Edwards was acquired by Wachovia Corporation. Wachovia Corporation was acquired by Wells Fargo. The former A.G. Edwards is now part of Wells Fargo.

STEP 4: TRANSFER OF LOCAL ASSOCIATION 10% FEE TO MSC



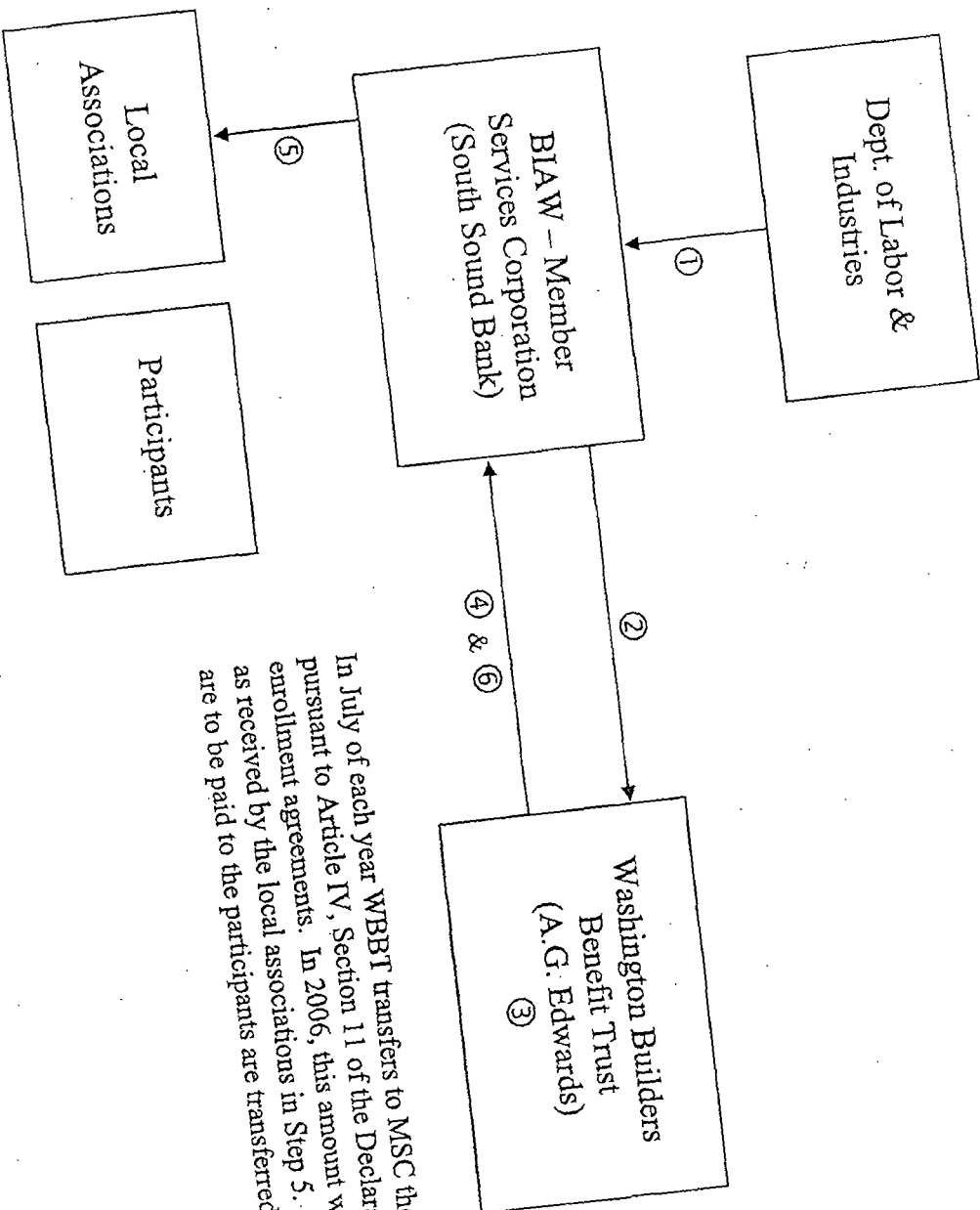
In June of each year, the portion of the 10% fee that is to be paid to the local associations, which are distributed to the local associations at the June BLAW board meeting. In 2006, the amount distributed to the local associations was \$3,917,641.45. This included \$2,614,652.11 with respect to the first adjustment on April 28, \$972,606.32 with respect to the 2003-04 second adjustment and \$330,383.03 with respect to the 2002-03 third and final adjustment.

STEP 5: PAYMENT OF LOCAL ASSOCIATION 10% FEES TO LOCAL ASSOCIATIONS



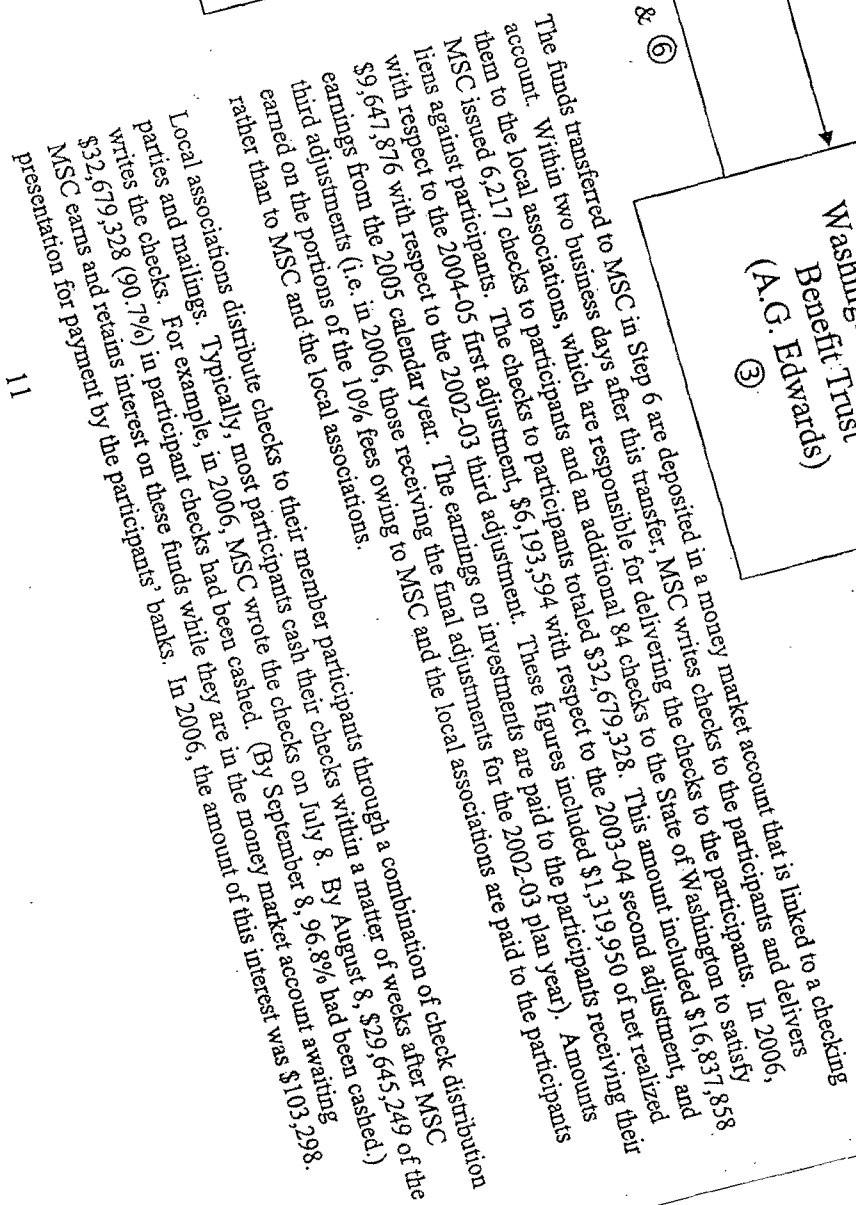
At the annual June BIAW board meeting, the local associations' 10% fees are handed out to representatives of the local associations. In 2006, this occurred on June 16.

**STEP 6:
TRANSFER OF BIAW 10% FEE AND PARTICIPANT DISTRIBUTIONS TO MSC**



In July of each year WBBI transfers to MSC the 10% fee to be paid to MSC pursuant to Article IV, Section 11 of the Declaration of Trust and Section 4.b of the enrollment agreements. In 2006, this amount was \$3,917,641.45, the same amount as received by the local associations in Step 5. At the same time, the amounts that are to be paid to the participants are transferred to MSC.

000-0



Appendix 7:

Appendices A & B to the April 23, 2010 State Defendants' Motion for Judgment on Petitioners' Trust Claims Based on the ROII Enrollment Agreement

CP 1504-1513

Note: The motion to which these appendices were originally attached appears at CP 1477-1503. These appendices include citations to Defendants Factual Record ("DFR") and Defendants Third Factual Record ("DFR III"), which appear at CP 8780-9409 and CP 1580-2132, respectively.

Appendix A: Index to Record Citations Supporting State Defendants' Interpretation of Enrollment Agreement § 4(b)

This Appendix collects the record evidence supporting the State Defendants' interpretation of the cost and fee language contained in Section 4(b) of the Enrollment Agreement. This provision is:

(b) ... The Member further authorizes the Trustees to pay from the Premium Returns the balance of the Enrollment Fee and such costs and expenses for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer ten percent (10%) of the Participant's Premium Returns applicable to the Coverage Period to local associations and 10% to BIAW for marketing and promotion of the Plan.

Enrollment Agreement § 4(b) (DFR Tab 14, at BIAW 000006).

As explained in the motions filed herewith, the State Defendants believe that the plain language of § 4(b) unambiguously:

- (1) allows for payment of operational and administrative costs out of the Premium Returns; and
- (2) further authorizes the transfer of 10% of the Premium Returns to BIAW and 10% of the Premium Returns to the local associations in consideration for their efforts in marketing and promoting the Plan.

The table below collects some of the evidence in the record supporting the State Defendants' interpretation of Section 4(b) and identifies its location in the DFRs.

Supporting Evidence	Record Cites
1. Plain language of Section 4(b)	Enrollment Agreement. DFR Tab 14, at BIAW 000006
2. Plain language of related provisions in the 1994 Declarations of Trust that created WBBT	1994 WBBT Declaration of Trust. DFR Tab 15, at BIAW-000034-35, Art. IV, § 11 ("Before distribution of the balance of each Fund left after payment of all expenses and final Adjustments by DLI, the Trustees shall to [sic] pay to BIAW a marketing assistance fee of 10% of all Employer Participants' distributive shares of the Fund. In addition, the Trustees shall pay to any local association with members who are Employer Participants in a Plan a marketing assistance fee of 10% of the distributive share of the Fund allocation so Employer Participants who are members of such local association.")

Appendix A: Index to Record Citations Supporting State Defendants' Interpretation of Enrollment Agreement § 4(b)

3. Plain language of related provisions in the 1990 Declaration of Trust	<p>1990 WBBT Declaration of Trust. Dkt. No. 277, Ex. 1 at BIAW-25659, Art. II, § 1(F) ("Before distribution of the balance of each Fund left after payment of all expenses and final adjustment, to pay an administrative fee to BIAW and local associations, the amount to be determined by the Trustees.")</p> <p>Rokes Dep. 31:17-32:6, 58:3-60:21 (DFR III Tab 30) (describing retro program and its fee structure as a way to make money for all involved (members, local associations, and BIAW) spread risk, align incentives, and drive membership for the association as a whole)</p> <p>McCabe Dep. 54:2-56:16 (DFR III Tab 29) ("[T]his was going to be a win/win/win: a win for the locals; a win for the state association; and a win for participating members. And this program was being set up so that BIAW and the local association could make money and enable them to provide extra services to their membership.") (also describing the fees to BIAW and the local associations as incentives needed to make the program to work)</p>
4. The intent of the settlors of those trusts	<p>McCabe Dep. 54:2-56:16 (DFR III Tab 29) ("The procedure that BIAW, MSC, and the Washington program was being set up so that BIAW and the local association could make money and enable them to provide extra services to their membership.") (also describing the fees to BIAW and the local associations as incentives needed to make the program to work)</p> <p>Kwieciak Dec. ¶12 (DFR III Tab 32) ("The procedure that BIAW, MSC, and the Washington Builders Benefit Trust follow for transferring funds has been the same since the commencement of this litigation, I do not recall anyone ever complaining about this way of doing things.")</p> <p>McCabe Dep. 98:12-14, 104:14-105:8, 126:23-127:1 (DFR III Tab 29) ("During the establishment of the 1990 trust up until its termination there was a marketing assistance fee being paid to BIAW and the locals") ("And 16 years later, WBBT still pays the 20 percent marketing assistance fee pursuant to the 1994 Declaration of Trust.")</p> <p>Rokes Dep. 111:23-113:4 (DFR III Tab 30) (discussing the source of the marketing assistance fee in the 1994 Declaration of Trust and stating that as far back as the 1990 trust "our practice was to pay 10 and 10" [referring to the 10% fee to BIAW and the 10% fee to the local associations])</p> <p>Romero Dec. ¶¶2-5 (DFR Tab 16), Exs. G-1 (DFR Tabs 23-25) (when DLI proposed a cap on</p>
5. 20 years of continuous practice (payment of the 10% fees to BIAW and the local associations)	

Appendix A: **Index to Record Citations Supporting State Defendants' Interpretation of Enrollment Agreement § 4(b)**

	<ul style="list-style-type: none"> • <i>Builders Association uncover hokum... Weakens Cause</i>, Tri-City Herald, Mar. 8, 2005 (“BLAW’s state organization keeps 10 percent of the [Retro] refund money, another 10 percent is split among its regional offices The rest is returned to the group’s members.”) • <i>Building Insight</i> newsletters featured front-page articles on these topics in several issues, including December 1999, February 2000, April 2000, June 2000, March 2001, October 2001, February 2002, February 2005, and March 2005. DFR Tab 1 ¶ 20; DFR Tab 3; DFR III Tab 32 ¶19; DFR III Tab 36 DFR III Tab 32 ¶19. • BLAW repeatedly sent letters to retro participants—including letters sent in January 2000, February 2002, and January 2005—notifying them that BLAW spends retro revenue on political activities. DFR Tab 16 ¶¶4, 8, 9; DFR Tab 1 ¶26 • BLAW posted <i>Builder New Facts</i> articles discussing its use of retro revenues to support political activities. DFR III Tab 32 ¶ 19.
<p>7. Testimony from 52 participants whose understanding of Section 4(b) is consistent with that of the State Defendants and inconsistent with that proffered by Petitioners.</p>	<p><i>E.g.</i>, Estabrook Dec. ¶6 (DFR 41-100) (“We were plainly told that there were fees associated with the retro program I had no expectation that the fees were only covering the costs associated with the program. I understood BLAW was making a profit on its work and that BLAW was free to spend the fees on whatever it decided.”); Thomas Dec. ¶¶8-9 (DFR 41-306) (“We quit Associated Industries’ retro program and joined BLAW’s . . . specifically because we knew that the fees charged by BLAW . . . would be used to fund BLAW’s political and legislative activities. . . . When we signed up for the BLAW retro program, . . . [t]he [BLAW] representative specifically told us that BLAW charged fees for participation in the program. He also told us that half of the 20 percent fee would go to our local association, and that half would go to BLAW. He clearly explained that BLAW used this money to fund its various programs, including the political and legislative activities that we strongly support. In addition, all of these fees were spelled out in the enrollment agreement we signed to become a participant.”)</p> <p><i>See also</i> Abenroth Decl. (DFR Tab 41-3 to 4, ¶¶7-9); Allemandi Decl. (DFR Tab 41-7 to 8, ¶¶5-</p>

Appendix A: Supporting State Defendants' Interpretation of Enrollment Agreement § 4(b)

6); Barber Decl. (DFR Tab 41-11, ¶ 5); Beckstead Decl. (DFR Tab 41-16 to 17, ¶¶ 5, 6); Blodgett Decl. (DFR Tab 41-22 to 23, ¶¶ 7-9); Borders Decl. (DFR Tab 41-38, ¶ 5); Burnett Decl. (DFR Tab 41-42, ¶ 7); Camp Decl. (DFR Tab 41-48, ¶ 6); Christie Decl. (DFR Tab 41-51, ¶ 6); Clifton Decl. (DFR Tab 41-68, ¶ 5); DeRosier Decl. (DFR Tab 41-80, ¶ 7); Dickson Decl. (DFR Tab 41-96 to 97, ¶¶ 7, 9); Evans Decl. (DFR Tab 41-107, ¶ 6); Erickson Decl. (DFR Tab 41-110 to 111, ¶ 7); Gomez Decl. (DFR Tab 41-123, ¶ 6); Hayes Decl. (DFR Tab 41-97, ¶¶ 6, 7); Hansell Decl. (DFR Tab 41-133 to 134, ¶ 7); Henthorn Decl. (DFR Tab 41-154 to 155, ¶ 4); Henderson Decl. (DFR Tab 41-140, ¶ 5); Hyatt Decl. (DFR Tab 41-153, ¶ 5 & Tab 41-154 to 155, ¶ 4); Gold Decl. (DFR Tab 41-119 to 120, ¶ 4); Kartak Decl. (DFR Tab 41-161, ¶ 6); Kronschnabel Decl. (DFR Tab 41-129, ¶ 4); Henderson Decl. (DFR Tab 41-140, ¶ 5); M. Moe Decl. (DFR Tab 41-204 to 205, ¶ 4); Grimes Decl. (DFR Tab 41-147 to 148, ¶ 5); Jacobsen Decl. (DFR Tab 41-217 to 218, ¶ 7); Ryan Decl. (DFR Tab 41-137, ¶ 5); Holmes Decl. (DFR Tab 41-157, ¶ 5); Morfeld Decl. (DFR Tab 41-217 to 218, ¶ 7); Hudson Decl. (DFR Tab 41-157, ¶ 5); Meier Decl. (DFR Tab 41-196, ¶ 6); Morfeld Decl. (DFR Tab 41-217 to 218, ¶ 7); Johnson Decl. (DFR Tab 41-174, ¶ 6); Meier Decl. (DFR Tab 41-196, ¶ 6); Patrick Decl. (DFR Tab 41-242, ¶ 6); S. Schwab Decl. (DFR Tab 41-174, ¶ 6); Moe Decl. (DFR Tab 41-209 to 210, ¶ 4); Patrick Decl. (DFR Tab 41-242, ¶ 6); Skaggs Decl. (DFR Tab 41-278, ¶ 6); Decl. (DFR Tab 41-225 to 226, ¶ 5); J. Schwab Decl. (DFR Tab 41-258 to 259, ¶ 7); Spears Decl. (DFR Tab 41-289, ¶ 6); Taylor Decl. (DFR Tab 41-246, ¶ 8); Shaffer Decl. (DFR Tab 41-273, ¶ 6); Straub Decl. (DFR Tab 41-315 to 316, ¶ 6); Decl. (DFR Tab 41-246, ¶ 8); Smith Decl. (DFR Tab 41-286, ¶ 7); Stewart Decl. (DFR Tab 41-286, ¶ 7); Van Lih Decl. (DFR Tab 41-315 to 316, ¶ 6); Stewart Decl. (DFR Tab 41-302, ¶ 7); Van Lih Decl. (DFR Tab 41-315 to 316, ¶ 6).

8. Testimony from 32 participants that they were informed by BLAW, representatives of their local association, that the when they enrolled, that the 10% payments were made to BLAW and the local associations to fund their activities, including political

E.g., Burnett Dec. ¶ 7 (DFR Tab 41-42) ("At the time we signed up, a BLAW representative fully disclosed the fact that the retro program charged an upfront fee as well as an additional 20 percent of any refund that we would receive. They also clearly explained to us that ... [BLAW's portion] would be spent on various BLAW activities, including its political and legislative activities."); Dickson Dec. ¶ 4 (DFR Tab 41-55) ("I knew about the mission and goals of the BLAW."); Clark Dec. ¶ 4 (DFR Tab 41-55) ("I knew that BLAW took an upfront fee, and retained a percentage of ... uses a portion of its profit to further the mission and goals of the BLAW and the local returns" and considered it "to be a benefit" that BLAW spent this money for political and legislative purposes); Evans Dec. ¶ 6 (DFR Tab 41-107) ("I knew that BLAW and the local

Appendix A: **Index to Record Citations Supporting State Defendants' Interpretation of Enrollment Agreement § 4(b)**

activities	<p>association took 20 percent of my refund ... [and] BIAW disclosed to me that it uses this percentage in part to engage in political and legislative activities.”); Hyatt Dec. ¶7 (DFR Tab 41-144 to 145) (“It was perfectly clear to me regarding what I would receive and it was clear that both BIAW and my local association would use the funds earned from the retro program for legislative and other activities.”); Thomas Dec. ¶9 (DFR Tab 41-309) (“BIAW[s] representative ... clearly explained that BIAW used ... [its 10%] to fund its various programs, including the political and legislative activities that we strongly support.”)</p> <p><i>See also</i> Blodgett Decl. (DFR Tab 41-22 to 23, ¶ 7); Doyle Decl. (DFR Tab 41-91 to 92, ¶ 7); Hansell Decl. (DFR Tab 41-123, ¶ 7 & Tab 41-125, ¶ 15); Henderson Decl. (DFR Tab 41-133 to 134, ¶ 7); Holmes Decl. (DFR Tab 41-140, ¶ 6); Motley Decl. (DFR Tab 41-209 to 210, ¶ 4); Van Lith Decl. (DFR Tab 41-316 to 317, ¶ 8). Some, while aware that BIAW used portions of its 10% payment to fund political activities when they enrolled, did not specify the source of their knowledge. <i>See e.g.</i>, Borders Decl. (DFR Tab 41-28 to 29 ¶ 9); Christ Dec. (DFR Tab 41-51, ¶ 8); Clarkson Decl. (DFR Tab 41-64, ¶¶ 6, 7); Clifton Decl. (DFR Tab 41-68, ¶ 5); Dickey Decl. (DFR Tab 41-83, ¶ 7); Erickson Decl. (DFR Tab 41-97, ¶¶ 9, 10); Gomez Decl. (DFR Tab 41-116, ¶¶ 5, 6); Grimes Decl. (DFR Tab 41-119 to 120, ¶ 4); Johnson Decl. (DFR Tab 41-157, ¶ 5); Kartak Decl. (DFR Tab 41-161, ¶ 7); Koidahl Decl. (DFR Tab 41-169, ¶¶ 5, 7); Kronschnabel Decl. (DFR Tab 41-174, ¶ 8); Lamb Decl. (DFR Tab 41-179, ¶ 11); Meier Decl. (DFR Tab 41-187 to 188, ¶¶ 4, 5); M. Moe Decl. (DFR Tab 41-193, ¶ 7); R. Moe Decl. (DFR Tab 41-196 to 197, ¶ 7); Morfeld Decl. (DFR Tab 41-204 to 205, ¶ 5); Smith Decl. (DFR Tab 41-273, ¶ 6); Stewart Decl. (DFR Tab 41-286, ¶ 7); Straub Decl. (DFR Tab 41-290, ¶ 7).</p>
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Appendix B: Index to Petitioners' Testimony Regarding Interpretation of Enrollment Agreement Section 4(b)

This Appendix collects the record evidence—solely deposition testimony—setting forth Petitioners' varied and often contradictory interpretations of the cost and fee language contained in Section 4(b) of the Enrollment Agreement. The provision is:

(b) ... The Member further authorizes the Trustees to pay from the Premium Returns the balance of the Enrollment Fee and such costs and expenses for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer ten percent (10%) of the Participant's Premium Returns applicable to the Coverage Period to local associations and 10% to BLAW for marketing and promotion of the Plan.

Enrollment Agreement § 4(b) (DFR Tab 14, at BLAW 0000006).

The table below describes each Petitioners' testimony as to their interpretation of Section 4(b), with citation to the relevant deposition testimony. The third column in the table illustrates the effect of Petitioners' interpretation on the language in the Enrollment Agreement.

Party	Proffered Interpretation of § 4(b)	Effect of Interpretation on § 4(b)
Cabinet Works	<ul style="list-style-type: none"> • Understood that BLAW would distribute refunds "less, you know, reasonable administrative and marketing costs." Shively Dep. 102:14–15 (DFR III Tab 28). • "I thought that that ten percent ... was for administrative and promotional marketing costs." <i>Id.</i> 218:23–219:1. • "This says that they're either going to spend my money—either they're going to give it to me or they're going to spend it for administration or they're going to spend it for marketing." <i>Id.</i> 	<p>The Member further authorizes the Trustees to pay from the Premium Returns the balance of the Enrollment Fee and such reasonable administrative and marketing costs costs and expenses for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer <u>The reimbursement of these costs shall be limited to up to ten percent (10%) of the Participant's Premium Returns applicable to the Coverage Period to local associations and 10% to BLAW for marketing and promotion of the Plan. All funds not used for reimbursement of administration or marketing costs will be refunded to participants.</u></p>

Appendix B: Index to Petitioners' Testimony Regarding Interpretation of Enrollment Agreement Section 4(b)

	134:1-4.	
	<ul style="list-style-type: none"> • "[P]aragraph 4(a) is about ... the costs of the program. One and a half percent or 150, whichever's higher.... Number two [paragraph 4(b)] appears to be an internal transfer of funds that may or may not be related to the costs of the program. ... [M]y compelling understanding of this is what's paid out are costs and expenses for the operation, marketing, promotion. That's what is the one and a half percent." Dubrow Dep. 55:9-18 (DFR III Tab 23). 	<p>Mr. Dubrow's construction of the provisions is largely unintelligible. It appears to be something like the following:</p> <p>4(a) The Member agrees to pay to BLAW or its subsidiary a Member Enrollment Fee equal to one and one-half percent (1.5%) of the Member's Premium for the period of July 1, 2004 through June 30, 2005 of One Hundred Fifty and no/100 Dollars (\$150.00), whichever amount is greater to cover the costs and expenses for the operation, marketing, and promotion of the Plan. ...</p> <p>4(b) If costs for operation, marketing, and promotion of the Plan exceed the amount collected by the enrollment fee, The Member further authorizes the Trustees to pay from the Premium Returns the balance of the Enrollment Fee and such costs and expenses for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer ten percent (10%) of the Participant's Premium Returns applicable to the Coverage Period to local associations and 10% to BLAW for the reimbursement of expenses incurred in operating, marketing and promotion of the Plan. Any portions of the 10% transfer not used for reimbursement of costs and expenses shall be distributed to participants.</p>
A-1 Builders	<ul style="list-style-type: none"> • Q: "You did understand, didn't you, that that money [10% fees] transferred to the local associations and to BLAW wasn't coming back to A-1 Builders?" A: "No." <i>Id.</i> 57:10-14. 	
RE Sources	<ul style="list-style-type: none"> • "I believe what this meant when I signed it ... was that I was authorizing the potential transfer of up to 20 percent for marketing and promotion of the plan." Du Pre Dep. 42:5-8 (DFR III Tab 24). 	<p>The Member further authorizes the Trustees to pay from the Premium Returns the balance of the Enrollment Fee and such costs and expenses for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer up to ten percent (10%) of the Participant's Premium Returns applicable to the Coverage Period to local</p>

Appendix B: Regarding Interpretation of Enrollment Agreement Section 4(b)

Index to Petitioners' Testimony Agreement Section 4(b) of Enrollment Agreement Regarding Interpretation of Enrollment Agreement Section 4(b)

<p>• Q: "...[I]s it your testimony ... that those transferred funds were to be used ... only for marketing and promotion of the retro plan?" A: "Correct." <i>Id.</i> 42:14-19.</p>	<p>The Member further authorizes the Trustees to pay from the Premium Returns the balance of the Enrollment Fee and such costs and expenses for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer <u>The reimbursement of these costs shall be limited to up to ten percent (10%) of the Participant's Premium Returns applicable to the Coverage Period to local associations and 10% to BIAW for marketing and promotion of the Plan.</u></p>
<p>• "My understanding was that membership dues to BIAW are free to - for them to use for whatever purposes they want, and that membership in the ROI program is expressly separate from that and will only be used for administering the - well, and program and - and refunding the - sent out." Farnam probably the mailers that they sent out." Farnam Dep 64:6-11 (DFR III Tab 27).</p>	<p>The Member further authorizes the Trustees to pay from the Premium Returns the balance of the Enrollment Fee and such costs and expenses for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer <u>The reimbursement of these costs shall be limited to up to ten percent (10%) of the Participant's Premium Returns applicable to the Coverage Period to local associations and 10% to BIAW for marketing and promotion of the Plan.</u></p>
<p>Living Space</p> <p>• "To my understanding, the ROI funds could only be used for reasonable administrative expenses ..." <i>Id.</i> 205:22-24.</p> <p>• Believes that the 10% fees can only be used to cover "costs and expenses for operation and administration of the plan." Schneider 43:5-11 (DFR III Tab 25).</p>	<p>The Member further authorizes the Trustees to pay from the Premium Returns the balance of the Enrollment Fee and such costs and expenses for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer <u>The reimbursement of these costs shall be limited to up to ten percent (10%) of the Participant's Premium Returns applicable to the Coverage Period to local associations and 10% to BIAW for marketing and promotion of the Plan.</u></p>
<p>McKinnon Furniture (Schneider)</p>	<p>The Member further authorizes the Trustees to pay from the Premium Returns the balance of the Enrollment Fee and such costs and expenses for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer <u>The reimbursement of these costs shall be limited to up to ten percent (10%) of the Participant's Premium Returns applicable to the Coverage Period to local associations and 10% to BIAW for marketing and promotion of the Plan.</u></p>
<p>McKinnon Furniture</p>	<p>The Member further authorizes the Trustees to pay from the Premium Returns the balance of the Enrollment Fee and such costs and expenses for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer <u>The reimbursement of these costs shall be limited to up to ten percent (10%) of the Participant's Premium Returns applicable to the Coverage Period to local associations and 10% to BIAW for marketing and promotion of the Plan.</u></p>

Appendix B: Regarding Interpretation of Enrollment Agreement Section 4(b)

Index to Petitioners' Testimony Regarding Interpretation of Enrollment Agreement Section 4(b)

for administrative costs of marketing costs of the plan. ... All the rest of the funds should have come—should have been refunded to the members.” McKimmon 37:7-9 (DFR III Tab 26).

reasonable administrative and marketing costs and expenses for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer the reimbursement of these costs shall be limited to up to ten percent (10%) of the Participant's Premium Returns applicable to the Coverage Period to local associations and 10% to BLAW for the marketing and promotion of the Plan. All funds not used for reimbursement of administrative or marketing costs will be refunded to participants.

(McKimmon)

Appendix 8:
Interest Chart

Trial Exhibit 1485 (excerpt)

Interest Earned by MSC Related to Distributions to the Five Petitioners					
Year	A-1 Builders	Cabinet Works	Living Space	Re Sources	SF McKinnon Co. Inc.
2004	\$ 1.35	\$ 1.45	\$ -	\$ 0.14	\$ 2.11
2005	2.72	3.69	-	12.60	4.79
2006	4.05	5.51	-	27.65	7.86
2007	29.87	4.33	3.36	62.08	25.47
2008	12.03	4.42	2.25	43.30	39.89
Totals	\$ 50.02	\$ 19.40	\$ 5.61	\$ 145.77	\$ 80.12

Appendix 9:
RCW 11.96A.150
(emphasis added)

RCW 11.96A.150

Costs — Attorneys' fees.

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. *The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.*

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

[2007 c 475 § 5; 1999 c 42 § 308.]

Appendix 10:
WAC 296-17B-200
(emphasis added)

WAC 296-17B-200

Group retrospective rating — Overview.

In group retrospective rating, participating employers become members of an enrolled group sponsored by an approved organization. Employers continue to pay premiums directly to the department as determined by chapter 296-17 WAC. We calculate the group's retrospective rating premiums as though the standard premiums paid by members of the group were paid by the sponsor, and claims assigned to employer members were assigned to the group sponsor. Group sponsors are responsible for the retrospective rating premiums for the coverage period enrolled. If an adjustment results in us refunding premiums, ***the refund is the property of the group sponsor.*** If an adjustment results in us assessing additional premiums, the additional premiums are the responsibility of the group sponsor. With limited exceptions explained in these rules, the department is not involved in the private contractual relationship between group sponsor and group member.

[Statutory Authority: RCW 51.16.035, 51.16.100, 51.04.020(1), and 51.18.010. 10-21-086, § 296-17B-200, filed 10/19/10, effective 11/19/10.]

Appendix 11:
WAC 296-17-90455
(emphasis in bold italics added)

WAC 296-17-90445

Wash. Admin. Code 296-17-90445

WASHINGTON ADMINISTRATIVE CODE
TITLE 296A. (CH. 1-59) LABOR AND INDUSTRIES, DEPARTMENT OF
CHAPTER 296-17. GENERAL REPORTING RULES, AUDIT AND RECORDKEEPING, RATES AND RATING
SYSTEM FOR WASHINGTON WORKERS' COMPENSATION INSURANCE
Current with amendments included in the Washington State Register, Issue 10-04, dated February 17, 2010.

296-17-90445. Valuation of coverage period.

Our responsibility:

· Nine months after the coverage period has ended, we will do an initial valuation of the losses for each employer and group participating in retrospective rating.

Note: Effective with the October 1, 2000, coverage period and all subsequent coverage periods thereafter, each retrospective rating plan has three mandatory valuations and no optional valuations. The first valuation takes place roughly nine months from the last day of the coverage period. Each subsequent valuation will occur at twelve-month intervals from the initial evaluation date.

Example: Assume that your coverage period began July 1, 2001, and ended June 30, 2002 (twelve calendar months). Our first valuation date would occur the end of March 2003. This is roughly nine months from the last day of the coverage period.

· On the valuation date, all claims with injury dates that fall within the coverage period are valued and the incurred losses that have been established for these claims are "captured" or "frozen."

Note: Our valuation is limited to the open or closed status of a claim on the evaluation date. We do not consider adjudicative decisions (i.e., claim allowance, case reserve, wage determination and dependent status) surrounding a claim in our valuation.

For occupational disease claims that arise from exposure to the disease hazard by two or more employers, the claim costs are prorated and assigned to each period of employment involving the exposure. Each employer responsible for at least ten percent of the claimant's exposure to the hazard is charged (see WAC 296-17-870(6)).

To compute the performance adjustment factors, assigned occupational disease losses are considered "retro losses" if on the date of the last injurious exposure with an employer, the employer was enrolled in retro. Occupational disease losses are considered "nonretro losses" if on the date of the last injurious exposure with an employer, the employer was insured with the state fund, but not enrolled in the retro program. Occupational disease losses that cannot be assigned as either retro or nonretro losses will not be considered in computing performance adjustment factors.

· During the adjustment process we convert the captured incurred loss of each claim into developed losses using the appropriate loss development and performance adjustment factors. Retrospective premium is then calculated using the

applicable formulas and tables in the retrospective rating manual.

- Prior to the application of the performance adjustment factor, we will cap the pure developed loss value for any one claim or group of claims arising from a single accident that has collective pure developed losses in excess of five hundred thousand dollars at a maximum of five hundred thousand dollars.

- Since the standard premium used in the retro calculation is based on premiums reported but not necessarily paid, we will deduct from the standard premium calculation any unpaid member premiums.

Note: A sponsoring organization and L&I can enter into an agreement for an alternate debt recovery method.

- Approximately twenty days after the valuation date, if entitled, we will send you your premium refund.

Note: If you participate in an individual plan or retro group, we will not issue a refund check if it is less than ten dollars. If a refund is less than ten dollars, we will credit the amount to your industrial insurance account and you can deduct the amount from your next premium payment. All retro group refunds are paid directly to the sponsoring organization. It is the responsibility of the sponsoring organization to distribute any refund to the group members. L&I does not regulate how refunds are distributed to group members. Employers that participate in retro are not required to share any of their retro refund with employees nor can they charge employees in the event of an additional assessment.

- We will send you a bill if you owe us additional premium.

Note: If you owe additional premium, it is due thirty days after we communicate the decision to you. We will charge penalties on any additional premium not paid when it is due (RCW 51.48.210). If you (employer in an individual plan or sponsoring organization of a retro group) are entitled to a refund for one coverage period and owe additional premiums for another coverage period, we will deduct the additional premiums due L&I from the refund. We will refund the difference to you. In the event that this adjustment still leaves a premium balance due, we will send you a bill for the balance. If an organization sponsors multiple retro groups and one group earns a refund and the other owes additional premium from a retro adjustment, we will deduct the additional premium from the refund due and issue a net refund to the organization for the difference or bill them for the remaining additional premium as applicable.

Statutory Authority: RCW 51.16.035, 51.16.100, 51.04.020(1), 51.18.010. 09-22-024, § **296-17-90445**, filed 10/26/09, effective 11/26/09. Statutory Authority: RCW 51.18.010 and 51.16.035. 07-17-140, § **296-17-90445**, filed 8/21/07, effective 10/1/07. Statutory Authority: RCW 51.18.010(1). 02-23-089, § **296-17-90445**, filed 11/20/02, effective 1/1/03. Statutory Authority: RCW 51.18.010. 00-11-060, § **296-17-90445**, filed 5/12/00, effective 7/1/00.

WAC 296 -17 -90445 , WA ADC 296 -17 -90445
WA ADC 296 -17 -90445

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